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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 418

FEDERAL POWER COMMISSION, PETITIONER

v.

STATE OF WISCONSIN, PUBLIC SERVICE COMMISSION OF WISCONSIN, ET AL.[1]

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

OPINIONS BELOW

The opinions of the Court of Appeals for the District of Columbia Circuit (R. V 1840–1856) are reported at 205 F. 2d 706. The opinions of the Federal Power Commission (R. V 1682–1822) are reported at 90 PUR (NS) 325 and 10 F. P. C. 246.

JURISDICTION

The judgment of the Court of Appeals was entered on May 22, 1953 (R. V 1858). By order of

[1] This is a companion case to *Phillips Petroleum Company* v. *State of Wisconsin, et al.*, No. 280, this Term and *State of Texas and the Railroad Commission of Texas* v. *State of Wisconsin, et al.*, No. 281, this Term, all pending before this Court on writs of certiorari.

the late Chief Justice Vinson, dated August 20, 1953, the time within which to file a petition for a writ of certiorari in No. 418 was extended to and including October 19, 1953 (R. V 1859). The petition for a writ of certiorari was filed on October 16, 1953. On November 30, 1953, the petitions of all parties in these proceedings were denied, 346 U. S. 896). Applications for rehearing were timely filed in Nos. 280 and 281, and on January 18, 1954, the Court vacated its orders denying certiorari and granted certiorari in Nos. 280, 281, and 418 (R. V 1860–1861, 346 U. S. 934–935). The jurisdiction of this Court rests upon Section 19 (b) of the Natural Gas Act (15 U. S. C. 717r (b)) and upon 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Phillips Petroleum Company produces or purchases in the field natural gas which it moves in a network of pipelines to processing plants which are also in the field. At these plants, the gas is commingled, processed, and, within a few hundred feet or yards of the plants, sold by Phillips to pipeline companies, which, in turn, transport the gas in interstate commerce and resell it in the consumer markets. The question presented is whether, on these facts, the Federal Power Commission is barred from deciding that, by virtue of the exemption contained in Section 1 (b) of the Natural Gas Act for "the production or gather-

ing of natural gas," Phillips' sales are excluded from the Commission's regulatory jurisdiction.

STATUTE INVOLVED

Section 1 of the Natural Gas Act (Act of June 21, 1938, c. 556, 52 Stat. 821, as amended, 56 Stat. 83, and 61 Stat. 459, 15 U. S. C. 717 *et seq.*) reads as follows:

> SECTION 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.
>
> (b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

STATEMENT

The Federal Power Commission on October 28, 1948, instituted an investigation to determine whether Phillips Petroleum Company is a "natural-gas company" within the meaning of the Natural Gas Act and, if so, whether any of its rates, subject to the Commission's jurisdiction, are unjust or unreasonable (R. V 1647–1650). The Cities of Detroit, Michigan; Kansas City, Missouri; Milwaukee, Wisconsin; and Wayne County, Michigan, as well as the State of Wisconsin and its Public Service Commission, intervened in support of Commission regulation of Phillips' rates (R. V 1687). The States of Texas, Oklahoma, and New Mexico or their agencies intervened in opposition to Commission regulation of Phillips' rates, contending that such regulation would interfere with the exercise by the States of their regulatory functions (R. I 80–83, 87–93, 100–103). The States of Arkansas, Kansas, Louisiana, Mississippi, or their agencies, as well as several royalty owners associations, also intervened in opposition to Commission jurisdiction (R. V 1686–1687).

Hearings commenced on April 3, 1951, and were concluded on May 23, 1951. The Commission, on April 17, 1951, limited the scope of the hearings to the question of Phillips' status under the Natural Gas Act, deferring the remaining issues to subsequent hearings (R. V 1671–1676).

In the course of some 39 days of hearing, a record was made comprising almost 5,000 pages of testimony and nearly 4,000 pages of exhibits.

The Commission granted an unopposed motion for omission of the intermediate decision procedure (R. V 1680–1681) and the record was certified to the Commission. After receiving briefs and hearing oral argument on July 9 and 10, 1951, the Commission on August 22, 1951, issued its opinion and order determining that Phillips was not a "natural-gas company" within the meaning of the Natural Gas Act; that certain sales and movement of natural gas by Phillips are not subject to Commission regulation; and that the Commission has no jurisdiction to regulate Phillips' rates. The Commission consequently ordered that the investigation be terminated (R. V 1682–1753). Their petitions for hearing having been denied (R. V 1836–1837), the interveners favoring Commission jurisdiction instituted proceedings for review in the court below in which Phillips and other opponents of jurisdiction intervened (R. I 1–72).[2] The Court of Appeals, Judge Clark dissenting, reversed (R. V 1840–1856). Briefly summarized the evidence in the record shows the following:

[2] Intervening in the court below in support of the Commission's order were Phillips, the State of New Mexico, and the Oil Conservation Commission of the State of New Mexico, the Corporation Commission of the State of Oklahoma, and the State of Texas through the Railroad Commission of Texas.

1. *Phillips' operations.*—Phillips is a large integrated unit engaged in many phases of the petroleum industry and owning extensive properties located in most of the important oil producing areas of the United States. Phillips is primarily an oil company which engages also in the production and gathering of natural gas. (R. III 863–869.) Although the percentage varies from year to year, Phillips' natural gas business in 1949 contributed only 4.2 percent of its gross operating revenues, with the percentage of net income being two or three times greater (R. V 1688).[2] Phillips does not engage in the movement of gas from the fields to consumer markets (R. V 1687–1690). There is no affiliation between Phillips and any natural-gas pipeline company. Phillips is thus an independent producer and gatherer of natural gas, as that expression is used in the industry (R. V 1714).

Notwithstanding that Phillips is principally engaged in the oil business, its operations as an independent producer and gatherer are substantial. As of December 31, 1949, Phillips owned or controlled by contract 15.22 trillion cubic feet of proven gas reserves (R. V 1689). Its network of gathering, residue and other gas lines constituting its gathering systems totaled approximately 4,380

[2] Phillips' gross operating revenues were divided as follows: Refined petroleum products, 48.9 per cent; crude oil, 24.3 per cent; natural gas liquids, 6.7 per cent; natural gas, 4.2 per cent; other, 15.9 per cent (R. III 852).

miles located in Arkansas, Kansas, Oklahoma, Texas, and New Mexico. Its production and gathering operations included 25 natural gas plants, 19 in Texas, 4 in Oklahoma and 2 in New Mexico, and part interest in 10 other plants, three of which it operates (R. V 1689). Phillips in 1949 sold over 400 million Mcf of natural gas and in 1950 about 500 million Mcf to intrastate purchasers and to interstate pipeline companies (R. V 1689). About 50 percent of the gas so sold is purchased from other producers (R. III 855), and a substantial portion of the remaining 50 percent is casinghead gas, i. e., gas produced from wells in conjunction with oil (R. IV 1328, 1358, 1388, 1420).

Phillips sells natural gas to five pipeline transmission companies, i. e., natural-gas companies subject to Commission jurisdiction under the Act[4] which transport and resell the gas to consumers and local distributing companies in fourteen States ranging from California to Michigan, Minnesota, Ohio and Wisconsin (R. V 1690, 1827–1834).

The gas which is sold by Phillips to these five natural-gas companies is produced and gathered, or purchased and gathered, by Phillips by means of its nine gathering systems. The gas flows into and through these systems to one of Phillips' ten

[4] Michigan-Wisconsin Pipe Line Company, Panhandle Eastern Pipe Line Company, Independent Natural Gas Company, Cities Service Gas Company, and El Paso Natural Gas Co. (R. V 1690).

processing plants. Each gathering system consists of a network of converging pipelines of progressively larger size, by means of which gas is collected and moved to the processing plants located generally in the center of each of the gathering systems.[5] The lines involved in these systems vary from a few inches to 30 inches in diameter, depending upon their relative location. They range in length from a few hundred feet to 40 miles, the length being determined chiefly by the distances necessary to move the gas to the point of final commingling within the particular gathering system. Generally the gas moves through the lines at well pressure, and final commingling is accomplished at the processing plants. Extractable products and impurities are removed at the processing plant and the gas is processed to enable Phillips to comply with the specifications of the particular sales contract involved. Thereafter, the gas moves a few hundred feet or yards to sales meters within or just outside the plant enclosure, where it is delivered to the purchasing interstate pipeline company which then transports it into other states for resale and ultimate consumption. (R. V 1691–1711.)[6]

[5] The complex character of the business of production and gathering is illustrated by a typical network of gathering lines as set forth in the map attached as an Appendix, *infra*.

[6] There are appended to this brief two charts, one which shows the points at which the sales in question take place (Appendix (2) from the Commission's opinion, R. V 1825) and

2. *The industry meaning of "gathering."*—Witnesses having long experience in the natural-gas industry and familiar generally with the operations taking place in the gas fields and plants and in particular with Phillips' activities, testified as to the commonly accepted meaning of "gathering" and as to whether Phillips' activities, including its sales to the transmission pipeline companies, are understood by the industry as being encompassed within that concept.

Mr. George P. Bunn, who is the manager of Phillips' natural gasoline department, and has had over 20 years experience in the natural-gas industry (R. I 319), testified that as "considered in the industry," and from his "knowledge of the operations of the industry" and of Phillips' operations, the operations involved in this proceeding have been considered from the beginning "as being those of gathering gas" (R. I 365). He described the distinctive economic function performed in the natural-gas industry, by such a business entity as Phillips, as follows (R. I 365–366):

> Historically the producer of casinghead gas in this industry collected the gas on his own lease or from several of his leases and he himself was predominantly the operator of a gasoline plant where such was installed,

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the other which shows a small segment of the intricate pattern of oil and gas wells and pipelines which cover the many fields from which Phillips gathers the gas which it sells (R. III 812–813). Other maps and charts are reproduced in Volume VI of the printed record.

and he collected the gas and processed it and conveyed it to points of disposal. His purpose was to do that. He found it desirable and economical to collect the gas from various wells, leading in various leases, to a common point or points of disposal so that the gas in the total quantity available from all sources was collected together at some one or more such points for the disposal necessary.

With regard to Phillips, he said (R. I 365): "* * * we have from the beginning considered our operations as being those of gathering gas." Those operations in which Phillips had been predominantly engaged, he described, as connected with Phillips' various "plant installations whether they be handling casing-head gas or gas from wells producing gas only or gas from a combination of the two"; and said that "we have considered ourselves gatherers of gas in the collecting of the gas from the wells or leases in the qualifying or conditioning of the gas and conveying it to one or more points of disposal in or near the area where the gas is produced" (R. I 365).

Mr. Bunn testified that the term "gathering line" has a well-defined and understood meaning in the natural-gas industry. Mr. Bunn stated that the Crane plant lines,[7] which are typical of the lines in which gas is moved to the plants gen-

[7] This plant forms a part of one of Phillips' gathering systems in the Permian Basin gas field in southwestern Texas, the source of certain gas delivered to El Paso.

erally, were "gathering lines" as that term was known in the industry, and that (R. I 368):

> Historically, I have never heard any other term used for those lines in general. They have always been called gathering lines. Sometimes they may be referred to simply as pipe lines or raw gas lines occasionally for distinction as among the many terms of equipment around the plant, but they have always been regarded and talked of as gathering lines.

He testified that this definition was applicable to the larger lines as they lead into the plant as well as the smaller lines, pointing to the economic function served by the lines as the determining factor (R. I 369):

> The purpose of gathering is to get the gas to one or more points of disposal. You don't gather out on the prairie or in the middle of a lake some place and then just stop. You get to the point of disposal. All of those lines, the larger ones which are larger only because they carry more gas, are gathering lines along with the smaller ones.[8]

[8] His testimony respecting the lines leading to the plants in other of Phillips' gathering systems involved in this case was to the same effect—all of such lines were "[gas] gathering lines within the meaning of that term as it has been and is known and understood" in the natural-gas industry (R. I 369; 370–374). "Gathering lines" include the "larger 24-inch lines as well as the smaller 4, 6, or 8 or 10-inch lines" since "There are not quite so many operators perhaps who have quite so extensive a system" as that of Phillips, and

As to the processing of gas at the plants, he stated that "the conditioning of the gas for disposal, both in the fractions that are disposed of in liquid and in gaseous form are a part of the functions of a gatherer" (R. I 365). He testified that the producer and gatherer historically regarded "the extraction of gasoline as a part of disposal and in cases where he sold the residue gas or where he utilized it * * * he considered the extraction facilities as partly qualifying or conditioning facilities in connection with his total operation of gathering in order to make the gas saleable or safe for use" (R. I 366). Regarding the conditioning of gas to comply with requirements contained in a sales contract, he stated, "whatever you are required to do to process the gas under these gas purchase contracts or whatever you elect to do in a gasoline plant along with that process-

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other operators "might not have as many of the larger sized lines"; nonetheless, the "system and its purposes are identical with those elsewhere in the industry and would be classified as gathering lines" (R. I 370). Subsequently, Mr. Bunn testified that the basis for his description of such lines as "gathering lines" was the fact that (R. II 640–641) "* * * in communication among units of the industry words are used, terms are used, such that there would be no doubt but what it is this type of line as expressed in these exhibits that would be called gathering lines by others in the industry. I also had in mind many contacts with people in the industry from day to day over the properties, looking at our lines with them and looking at their lines, and referring to them regularly as such, as gathering lines * * *. It is a matter of acquiring a broad knowledge over a period of years * * *."

ing, and as a part of the total processing, that is all a part of gathering" (R. II 634).

As to gas delivered to the pipeline companies and compressed at compressor stations in the field area or in the plants, Mr. Bunn testified that such compressing of gas was "a part of the process of gathering in that it is conditioning gas for disposal," adding that "the purpose in gathering is to collect the gas, condition it and move it to points of disposal" (R. II 631). He further agreed that the movement of gas from the plants for relatively short distances to the pipeline companies "is still part of the gathering up to the point of actually delivering it, adding that whether the point of delivery is "in or near the area of production" was of significance, depending on the circumstances of the case (R. II 634).[9]

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[9] Mr. Bunn testified further that certain other properties owned and operated by Phillips in connection with its gathering business, such as "booster" pumping stations employed in elevating the pressure of the gas to collect it from the wells and move it to the plants (R. II 634–644; 649–651), lines used for purposes other than moving the gas to the points of disposal (R. II 644), sales meters at the end of the lines delivering gas to the purchasing companies (R. II 636), and other appurtenant facilities in the systems and plants, although not "pipe lines," were "gathering facilities," because "they take part in the operation of gathering" (R. II 644, 647), and are "encompassed in the entire operation of gathering" (R. II 657; 658–662). As to the difference between "gathering facilities" and "facilities incidental to gathering," he testified that the former consisted of "those facilities that are involved directly in the physical operations of the collection,

Mr. Bunn concluded by testifying repeatedly that "gathering in our concept involves the sale" (R. II 677, 672), that "the sale is an incident to gathering, just like the purchase of the gas" (R. II 637, 677), and that gathering "does not end except on the completion of the sale" (R. II 673). And although as a nonlawyer he found it difficult to state the place of sale as a "legal" matter (R. II 677), he made it clear that as a matter of practical operating procedure in the industry, and from the standpoint of the economic function involved, Phillips' sales were indeed "an incident to gathering," because its facilities are built "to sell gas," and that initially Phillips endeavors to "make a contract with someone who wants the gas and then we provide the facility to make the disposal" (R. II 677–678).

Other witnesses experienced in the practical aspects of the industry and familiar with Phillips' operations, testified to the same effect. Mr. A. M. Rippel, a witness called by staff counsel [10] and employed in the natural-gas industry since 1925 (R. I 299–300), stated that "gathering of natural gas" involved "the collection of the gas from

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the conditioning or qualifying of the gas and the disposal" of the gas, and the latter—facilities "incidental to gathering"—consisted of other things not so directly involved in the disposal of the gas, but "still perform[ing] part of the total gathering operation" (R. II 675).

[10] Throughout the administrative proceeding, staff counsel took a position in favor of Commission jurisdiction (R. V 1747).

wells or points in or near the leases" through a "system of pipelines" (R. I 311), the "preparation of the gas for market" (R. I 311), including the "conditioning of natural gas to make residue gas and gasoline" (R. I 311), the "preparation of the gas which we are [sending] to market" (R. I 314), and the "entire operation, gathering the product of which we dispose" (R. I 314), all are "part of gathering" (R. I 314). Larger gathering lines providing the connection between smaller lines in the field and the plant, as well as the smaller lines, were equally "gathering lines," since their "function is gathering gas" (R. I 310). He also testified that (R. I 310–311):

> The only purpose of gathering natural gas is to dispose of it, whether through use, sale and the gas, the natural gas, as produced is gathered, prepared for market and disposed of, in its preparation, the liquifiable hydrocarbons are taken out, removed and sold. That is a part of the natural gas. After the extraction of the liquifiable hydrocarbons, the term residue is commonly used, and that is what is sold or used in the majority of our sales and uses.

The plants and the disposal of gas from the plants likewise were stated to be a part of gathering, for as he testified, in response to questioning by staff counsel (R. I 305–306):

> Q. In all of the cases where you have jurisdiction over the gathering of gas, as you

call it, that gas moves from the well head through connecting pipe lines into the plant, gasoline plant?—A. If there is a gasoline plant where we gather gas, it does enter a plant which is partly a part of the gathering system.

Q. Why do you say it is a part of the gathering system?—A. Because it, in fact, is. The gas is not gathered until it's—at least the residue part of it is not gathered until it is—delivered for sale.

Mr. A. W. Paris, employed in the natural gas industry since 1923, testified on direct examination by staff Counsel (R. I 197) with respect to Phillips' Dumas plant and gathering system whereby certain gas is delivered to El Paso. He stated that "throughout my 35 years in the industry" such a system "has never been known as anything else, except a gathering system," pointing out that, although the system may have changed in that time, "the purpose of it hasn't" (R. I 205). The testimony of Mr. Howard Markley, employed in the gas and oil fields since 1932, was in agreement that the lines through which Phillips collects gas and delivers it to the plant "are known as gas gathering lines" and that that terminology applies "to all of such lines" including "the large diameter lines that lead into the plant" (R. I 272–273). All of such lines are "part of the system" (R I 275). These conclusions he arrived at not as the result of formal study, but as "a matter of prac-

tice that has existed" all through his "experience in the industry" (R. I 280).

W. J. Murray, Jr., Railroad Commissioner of Texas, who has had years of engineering experience in the oil and gas business, testified that he considered the processing of gas a part of gathering, that they "are all tied in together" (R. II 501). Mr. W. S. Etchieson, an engineer with over 15 years' experience in the natural-gas industry, testified that Phillips' lines carrying gas to the various plants in its gathering systems, including lines in which the flow of gas could on occasion be reversed (R. I 138–146), were considered as "gathering" lines (R I 147, 148), and referred to the networks of lines serving the function of collecting the gas to the various plants as "gathering systems" (R. I 173–174; 190).[11]

[11] The only other testimony as to the practical meaning of "gathering" was that of Henry I. Stevens and B. P. Stockwell, both employees of the Federal Commission (R. II 680, 689). While they both said that gathering may extend as far as the processing plant (R. II 681–682, 691–692), both agreed that no flat rule could be formulated as to the termination of gathering in all cases. Mr. Stockwell stated (R. II 681):

"Gathering of gas cannot extend beyond the point where common pipe line enters the processing plant or connects with a transmission line. Gathering may, however, under certain circumstances end at a point short of the processing plant. It is impossible to state in general terms where gathering will end in all circumstances. I have undertaken only to fix an ultimate limit of gathering in my statement of where gathering ends."

Similarly, Mr. Stevens testified (R. II 692):

"Gathering ends when natural gas has been assembled at

3. *The Commission's opinion.*—In determining whether Phillips was subject to regulation as a "natural-gas company," the Commission evaluated the foregoing evidence in light of the legislative history of the Natural Gas Act (R. V 1713–1720), the pertinent judicial decisions (R. V 1728–1740), as well as its own administrative interpretation of the Act (R. V 1720–1728). Based on this evaluation, the Commission concluded that Phillips' operations "consist of production and gathering, or incidents of or activities related to these functions, thus requiring their inclusion within the Act's exemption" (R. V 1742). The Commission found that since the function of the lines moving the gas to each processing plant was that of gathering, the movement of gas through the lines is a part of gathering and therefore exempt (R. V 1743). The processing of gas to make it saleable or to recover extractable products or both, as well as the movement of gas in the relatively short lines from the plant to the point of sale, the Commission found was part of Phillips' gathering business or "at least exempt as an incident of or activity related to its gathering process" (R. V 1743). The Commission found that the sales, "the

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some common point of flow, point of common flow, in a pipe line designed to carry that gas to a processing plant or to some connecting transmission line. Gathering cannot possibly extend beyond the processing plant. It may end short of the processing plant. That determination depends upon a study and consideration of the facts in such instances."

end product of production and gathering, * * * likewise [are] a part of Phillips' gathering business, or at least an exempt incident thereof" (R. V 1744). The Commission also found that "[t]hough technically consummated in interstate commerce, these sales are made 'during the course of production and gathering' ", and that the sales "are so closely connected with the local incidents of [production and gathering] as to render rate regulation by this Commission inconsistent or a substantial interference with the exercise by the affected States of their regulatory functions" (R. V 1745). In this regard the Commission adverted to the direct relation between price and conservation (R. V 1745) and found that the costs it allowed in fixing rates would run counter to State conservation efforts, through the fixing of minimum well-head prices or otherwise, to encourage the maximum recovery and utilization of gas (R. V 1745–1747).

Commissioner Draper concurred in the result reached by the Commission for the reason that Commission regulation would be inconsistent or conflict with the exercise by the States of their regulatory power (R. V 1753–1755). Commissioner Buchanan dissented (R. V 1755–1822).

4. *The opinion of the court below.*—The Court of Appeals for the District of Columbia Circuit reversed the Commission. The majority held that Phillips' sales "are made after production and

gathering have been completed," that the exemption of "production or gathering" from Commission regulation by Section 1 (b) of the Act is inapplicable, and that Phillips' sales are subject to the Commission's jurisdiction under the affirmative language of the Act (R. V 1849).

Judge Clark dissenting, examined the legislative history of the regulation of the natural-gas industry, noting that this industry is divided into three main businesses, each with its distinctive character: production and gathering, transportation by pipeline companies to consumer markets, and local distribution. He was of opinion that sales by a producer and gatherer are a part of production and gathering and within the exemption of Section 1 (b) of the Act. He concluded that Congress intended to delegate to the Commission power only with respect to the business of transportation of natural gas by pipeline companies to consumer markets, and that the "gap" intended to be regulated existed only with regard to that business. He concluded, also, that Congress in any event had specifically expressed an intention to reaffirm power of regulation in the states to regulate the production and gathering business, if that power previously had been in doubt.

SUMMARY OF ARGUMENT

The case brings before this Court for the first time the question whether the sales of natural gas made by an independent producer and gatherer at the termination of gathering to an

interstate pipeline company for transportation and resale in other States come within the affirmative grant of jurisdiction to the Commission or are excluded from federal regulation under the exemption of "the production or gathering of natural gas." Section 1 (b) of the Natural Gas Act, *supra*, p. 3. In contrast to the Act itself which does not contain any authoritative definitions of the critical terms, the extrinsic criteria which are customarily looked to in such situations, i. e., the Act's purpose and legislative history, the construction of the administrative agency as well as the industry's understanding of the terms, uniformly reveal that such sales by gatherers were regarded as part of the gathering business which was intended to be exempt.

A. The Act's legislative history plainly reveals Congress' recognition of the three functional divisions of the natural gas industry, (1) production and gathering of gas in the field, (2) transportation and sale in interstate commerce, and (3) distribution to local consumers, and a repeatedly reiterated intention to deal only with the abuses resulting from monopolistic control by the pipeline companies of the strategic middle link of the industry, evils revealed by the Federal Trade Commission report of 1935, from which the Gas Act stemmed (see Section 1 (a) of the Act, *supra*, p. 3). The history, however, contains no suggestion that the evils of monopolistic control were prevalent among the independent producers of natural gas.

Indeed, the predatory practices of the pipeline monopolies, strengthened by their expansion into production itself, had substantial deleterious effect upon the "independent producers," who, together with "state commissions, * * * and communities having or seeking the service were growing quite helpless against these combinations." *Federal Power Commission* v. *Hope Natural Gas Co.*, 321 U. S. 591, 610. As a result, there was no need of regulation of any of the producers' activities, including their sales to the pipeline companies; on the contrary, the independent producers needed protection from the pipeline companies.

It is highly significant in itself that the legislative discussions are bare of any mention of even the possibility of imposing federal regulation upon the substantial proportion of the natural gas industry represented by the independent producers and gatherers of gas. In addition, there are affirmative manifestations of Congressional intent *not* to regulate sales by producers and gatherers. For example, in the hearings on H. R. 11662, 74th Cong., 2d Sess., a bill "substantially similar to the Natural Gas Act" (*Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 505), the Commission's Solicitor repeatedly stated in testimony, some of which is quoted in *Panhandle* (337 U. S. at 505, fn. 7) that the bill "does not attempt to regulate the

gathering rates or the gathering business." Nobody who had any connection with the legislation while it was pending before Congress disagreed with this testimony, and there is no indication that the subsequent bills were intended to have a broader application.

The excerpt from H. Rep. No. 709, 75th Cong., 1st Sess., the principal portion of the legislative history relied on by the court below (R. V 1843–1844), does not support a contrary result when read in context. Nor are the cases defining the gap which the federal act was meant to fill comparable to the present situation. *Public Utilities Commission* v. *Attleboro Steam and Electric Co.*, 273 U. S. 83; *Missouri* v. *Kansas Natural Gas Co.*, 265 U. S. 298.

B. Beginning with *Columbian Fuel Corporation*, 2 F. P. C. 200, issued two years after the Gas Act was approved, at a time when four of the five Commissioners had been in office both when the Act was passed and when the predecessor bills were under consideration in Congress, the Commission has consistently held that Congress had not delegated to it power to regulate the business of production and gathering, including sales made at the termination thereof to a pipeline company. "In no case in its history has this Commission held that the Act gives it jurisdiction over a company solely by reason of its movement of gas in interstate commerce or sales in interstate commerce for resale, where such move-

ment or sales in interstate commerce take place in the process of production or gathering" (R. V 1720–1721). Under well-established principles, such consistent refusal by an agency charged with administering a statute to assert a questioned power is a "powerful indication" that the authority is lacking. *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, 351–352.

C. By omitting from the Act a definition of "gathering" or of the elements for fixing the character of "production or gathering" in relation to the Act's coverage, Congress left to the Commission's expert judgment the determination of the term's scope, based upon an appraisal of its specialized meaning in the industry. Many decisions of this Court hold that where the question is one of specific application of a broad statutory term, the function of the reviewing court is limited to ascertaining whether the administrative conclusion has a reasonable basis in law and is supported by the evidence. E. g., *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 131; *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 146. Inasmuch as the Commission's conclusion here accords with the purpose and intent of Congress and is supported by evidence showing that as commonly understood in the industry "gathering" encompasses all activities from the wellhead to the final sale to the interstate transporter, the court below erred in upsetting the Commission's decision.

D. The holding below is based on a misconstruction of the decisions of this Court. *Colorado Interstate Gas Co.* v. *Federal Power Commission,* 324 U. S. 581, involved sales by affiliated natural gas companies made after interstate transmission and long after production and gathering; the question as to the proper rate base for such sales patently did not involve a holding on the issue here. In *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U. S. 682, the Court did not pass on the instant question but rather expressly reserved it (see 331 U. S. at 690, note 18). In addition, *Interstate* is factually distinguishable. Furthermore, the Court there noted that there was no claim that there the exercise of federal jurisdiction would conflict with state conservation functions; here, the producing states immediately concerned have vigorously opposed federal jurisdiction, and the Commission has found, on substantial evidence, that federal regulation would be inconsistent or substantially interfere with the exercise of state conservation functions, with the result that the exception explicitly recognized in *Interstate,* rather than its holding, is applicable here.

The later decisions in *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.,* 337 U. S. 498, and *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.,* 340 U. S. 179, although not passing on the question here presented, are not irrelevant and

in fact furnish considerable support for the Commission's decision. In *Panhandle,* the Court held that the statutory exemption extended beyond the mere physical activities of production and gathering to incidents connected with and activities related to gathering. This, together with the Court's reading of the legislative history, which parallels generally that of the Commission in this case, strongly suggests the propriety of the Commission's approach here. And in *Cities Service,* the Court's stress on the importance of local regulation of natural gas in the interest of conservation and on the minimal effect of field prices on the domestic delivered price paid by the consumers, coupled with the holding that in the interest of conservation the states may constitutionally fix the wellhead price for gas destined for interstate commerce, similarly supports the Commission's interpretation of the production and gathering exemption.

ARGUMENT

THE COURT BELOW ERRED IN REVERSING THE COMMISSION'S FINDING THAT PHILLIPS WAS NOT A "NATURAL-GAS COMPANY" SUBJECT TO REGULATION UNDER THE NATURAL GAS ACT

Critical to the determination of the issue presented by this case is Section 1 (b) of the National Gas Act, which provides:

> (b) The provisions of this Act shall apply to the transportation of natural gas in inter-

> state commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

The Act thus affirmatively applies to (1) transportation of natural gas in interstate commerce, (2) sale of natural gas in interstate commerce and (3) natural-gas companies engaged in such transportation or sale. Cf. *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U. S. 507, 516. There is no dispute as to the Commission's conclusion that the sales of Phillips involved here are sales in interstate commerce of natural gas for resale (R. V 1740). Nor is there disagreement with its holding that Phillips' movement of gas to the points of sale constitutes transportation in interstate commerce as a matter of constitutional law (R. V 1740). Thus, if Section 1 (b)'s affirmative statements were the only relevant provisions, Phillips would come within the Act's definition of a "natural-gas company."

But that same Section also provides that the Act shall not apply:

> * * * to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or *to the production or gathering of natural gas.*

The statute does not define "production" or "gathering." Nor does the word "gathering" on its face reveal with any clarity whether sales made by a producer or gatherer at the terminus of gathering to purchasers who transport and resell it in interstate commerce are or are not within the exemption. In the absence of any authoritative definition of a word used principally in industry, it is obviously appropriate to look to industry understanding, the interpretation of the expert agency in the field, and other manifestations of what Congress thought it was regulating and exempting when it passed the Act.

Accordingly we turn to these customary extrinsic criteria—the Act's purpose and legislative history, the construction by the administrative agency and the industry's understanding of the terms used in the statute. Examination of these materials will reveal, as we show *infra,* that the sales by the gatherer were regarded as a part of the business of gathering which was intended to be exempt. The court below predicated its contrary conclusion primarily upon prior decisions of this Court, which, as we shall show, did not pass upon or determine the question here presented.

A. THE LEGISLATIVE HISTORY REVEALS A CONGRESSIONAL PURPOSE AND INTENT NOT TO SUBJECT TO FEDERAL REGULATION THE BUSINESS OF PRODUCTION AND GATHERING, INCLUDING SALES MADE AT THE TERMINATION OF THE GATHERING PROCESS

The natural-gas industry is divided into three parts—production and gathering of gas in the field, transportation and sale in interstate commerce, and distribution to local consumers. The history of the Act reveals plainly that Congress intended that the Act deal only with the evils disclosed in the central part of the industry, in order to protect the producers and gatherers at the beginning, as well as the local distributors and the consumers at the end, from the monopolistic practices of the pipeline companies in the middle. Thus the history is replete with evidence of a Congressional intent to regulate sales by these transmission pipeline companies. In addition the history contains affirmative evidence of Congress' intent *not* to regulate the sales of those engaged solely in the business of production and gathering, i. e., "the gathering business" and "gathering rates," and so to deny to the Commission jurisdiction over "either the gathering end or the distributing end of the business." It is indeed significant in and of itself that there is no mention in the discussions preceding the passage of the Act of even the possibility that such a substantial proportion of the natural gas industry was being subjected to federal regulation.

1. *The Federal Trade Commission Report of 1935.*—As appears from Section 1 (a) of the

Natural Gas Act,[12] the Act stemmed from the 1935 report of the Federal Trade Commission dealing with the necessity of correcting through regulation the evils resulting from the monopolistic practices of the interstate pipeline companies. This Report was the result of an investigation of the activities of public utility holding company systems. Part 84–A of the Report dealt with control by such systems of public utility corporations doing an interstate business in supplying natural gas to the consumers (Sen. Doc. No. 92, Pt. 84–A, 70th Cong., 1st sess. (1935)). The natural-gas industry was found to encompass three functionally distinct businesses consisting of: (1) those activities required for discovery and production of natural gas; (2) transportation of such gas through pipelines to points of ultimate consumption; and (3) the sale or marketing of natural gas at the places of consumption.[13] This

[12] SECTION 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

[13] S. Doc. No. 92, p. 111. See also p. 602. Elsewhere, the Report recognizes the same functional division of the industry into production, transmission and distribution, and adds a fourth, the extraction of byproducts. *Id.* pp. 55–56.

tripartite division of the industry on the basis of the economic functions performed by each branch is fundamental to the Report's discussion of the problems of the industry and its recommendations with respect to those problems."

The abuses which were said to require remedial legislation involved the control of the strategic middle link between production and distribution—the interstate transmission of gas from the producing fields to the local distributing companies. Monopoly control of the transmission facilities, the "vital link of transportation" (*id.* at p. 610), represented the evil requiring Congressional correction. The Report stated (*id.* at p. 591):

> Whoever controls the channels by which a product is marketed controls the market so far as the supply is concerned. Concentrated control of those channels confers a strategic advantage that may be used by those possessing it to extend their domination into both the producing and distributing branches of the industry. It is important therefore to understand how far such concentrated control has proceeded among the chief interstate pipe lines, the only channel by which natural gas can reach the consumers located elsewhere than at the gas fields.

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[11] See Chapter IV, "Technical Characteristics and Problems of the Natural-Gas Industry," S. Doc. No. 92, Part 84–A, pp. 111–158; Chap. XIII, "Conclusions and Recommendations," pp. 607–617.

Speaking of Columbia Gas & Electric, Cities Service, Electric Bond & Share, and Standard Oil of New Jersey, the Report went on (*id.* at p. 592):

> * * * ownership and control of the major pipe lines of the entire country east of the Rockies are rapidly being concentrated in the hands of four groups which are so closely interrelated as to constitute for all practical purposes a single interest of enormous power.

The Report recited the strategic advantage gained by the pipeline transmission interests resulting from the fact that "[t]here is no known method by which gas in large quantities can be transported except by pipe lines" (*id.* at p. 112); that in contrast with the transportation of other commodities, there was no choice of routes or other means of transport available; that the tremendous cost of construction precluded construction of any substantial number of outlets from a given area; that, increasingly, a limited number of companies acquired control over available outlets, and, that competition was diminished by reason of the monopoly position occupied by the pipeline interests to the detriment of the consumers. The Report stated (*id.* at p. 113):

> * * * the controlling interests in gas transmission pipe lines which were also interested in local gas-distribution companies admittedly operating as public utilities, have often taken advantage of this position of interstate monopoly of transmission. They have made charges for gas delivered to the

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> local distribution companies which resulted in relatively high rates of return or profit to the pipe line companies, but imposed such a burden upon operating utilities * * * that such distribution companies often showed very small profits and in some cases heavy deficits.

No one suggested that the evils of monopolistic control were attributable to the producers or gatherers of gas. Indeed, it was pointed out that the predatory practices of transmission pipeline monopolies had substantial deleterious effects upon the producers (*id.*, p. 590; see also p. 159):

> To the extent that large pipe line interests do not need to buy gas from unaffiliated producers but obtain it from their own wells or from wells of affiliated companies, they are in position to control the price at which independent producers must sell. In other words, control of the market outlets accentuates whatever control the pipe line interests have of the available gas supply. The relation between pipe line purchasers is frequently so close by reason of community of ownership, reciprocal contracts, or informal cooperation that independent producers have nothing to hope for in the way of competitive bidding.

Further, the Report pointed out in comparing the independent producer of gas to the independent producer of anthracite coal, that whereas the latter has a relative degree of flexibility in selling his product to the public, the "independent gas producer, lacking capital and gas reserves

necessary to warrant building pipe lines and assuming responsibility for distribution, especially as a public utility, has no outlet other than to sell his product under contract at the well to the large interests owning the pipe lines and distribution facilities necessary to market his product" (*id.*, p. 80). Clearly this indicates that the independent producers and gatherers were not the intended subjects of regulation, but, on the contrary, were subjects for protection.

The Report further stated (at p. 132):

> In some important fields, the pipe line companies, either directly or through affiliated interests, control very large proportions of the gas acreage and wells, and, therefore, potential production. They may even more completely control the available outlets to consumer markets. The set-up price of gas at the wells within such groups is subject to many possible influences other than actual costs plus a reasonable profit. The actual field price is more a problem of the independent producer seeking a buyer, faced as he often is with no freely competitive market.

The natural-gas industry was represented as: "strongly competitive both in procurement of the supply and in sale or disposal. It is highly competitive at both ends and in two of its three groups of functions. It is thus definitely differentiated from many other public utilities, which often have a considerable competitive element in the disposal

or sale of their services and commodities but are but little affected by immediate competition in the facilities or functioning for production." (*Id.* at p. 112.)

Additionally, it was pointed out in the Report that the: "development of interstate pipe lines of large capacity" had given rise to important questions with respect to the conservation of natural gas (*id.* at p. 109). Development of the pipe lines, forming "the vital connection" between "production of gas, which is subject to State regulation, and its transportation in interstate commerce," subject to Federal regulation, emphasizes the need for comprehensive regulation. Solution of these interrelated problems necessitated complementary regulation by both State and Federal agencies, each within its respective spheres (*ibid.*). State regulation would extend to the first and third functional divisions of the industry, production and gathering and local distribution. Federal regulation was recommended for the intervening gap, interstate transmission and wholesale sales to local distributors.[15]

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[15] As stated in the Report (at pp. 85–86), "Due to the overlapping nature of the business, which is intrastate as to production, interstate as to transmission, and intrastate as to local distribution, such a program [of regulation of the entire field] would necessarily involve close cooperation of State and Federal agencies, each to supplement the efforts of the other. * * * Regulation of interstate commerce being constitutionally reserved to the Federal Government would seem to indicate that regulation of pipe-line developments,

As summarized in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 610:

> * * * the investigations of the Federal Trade Commission had disclosed that the majority of the pipe-line mileage in the country used to transport natural gas, together with an increasing percentage of the natural gas supply for pipe-line transportation, had been acquired by a handful of holding companies. State commissions, *independent producers,* and communities having or seeking the service were growing quite helpless against these combinations. *These were the types of problems with which those participating in the hearings were preoccupied. Congress addressed itself to those specific evils.* [Italics supplied.]

Statutory language is, of course, to be read in the light of the legislative aim and to avoid bringing about a result at variance with the purpose of the statute (see, e. g., *United States* v. *Public Utilities Commission,* 345 U. S. 295; *United States* v. *American Trucking Assn's,* 310 U. S. 534,

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operations, and wholesale prices would be a function to be definitely assumed by the Federal Government to supplement the present deficiencies of State regulation, by substituting direct and comprehensive authority in determining wholesale prices and transportation charges for at the present largely indirect and ineffective efforts of individual States to regulate wholesale or city gate prices where interstate commerce is involved. Beyond this again lies the field of local utility distribution which is now, and should continue to be, administered by the various States."

543). The report of the Federal Trade Commission, upon which the statute was largely based, clearly points to the conclusion that no part of the business of independent producers and gatherers was intended to be subjected to federal regulation. For there was not the slightest suggestion that the evils at which the statute was directed were attributable to them. And this conclusion would extend to the terminal point of their portion of the business, the sale *to* the pipeline company, as well as to their other activities.

2. *Predecessor Bills and Committee Hearings and Reports Thereon.*—Analysis of five of the considerable number of bills introduced in Congress prior to the enactment of the Natural Gas Act in 1938, and their related Committee hearings and reports, is particularly helpful in determining the intent of Congress in enacting this legislation.[16] These materials reflect, as previously recognized by the Federal Trade Commission, (1) that the natural-gas industry was divided into

[16] The bills are H. R. 5423, 74th Cong., 1st sess. (1935), the Public Utility Act of 1935, and hearings before the House Committee on Interstate and Foreign Commerce, 74th Cong., 1st sess. (1935); H. R. 11662, and hearings thereon before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 74th Cong., 2d sess. (1936); H. R. 12680 and House Report No. 2651, 74th Cong., 2d sess. (1936); H. R. 4008 and hearings thereon before the House Committee on Interstate and Foreign Commerce, 75th Cong., 1st sess. (1937); and H. R. 6586, the bill which was passed and became the Natural Gas Act and House Report 709, 75th Cong., 1st sess. (1937).

three functional divisions, viz, production and gathering, interstate pipe-line transmission and sales, and local distribution; (2) that the proposed legislation was directed at the evils, predatory practices, and grossly excessive charges of the interstate pipe-line companies; and (3) that there were evils from which the independent producers as well as the consumers needed protection and which the affected States were constitutionally without power to provide under this Court's holdings in *Missouri* v. *Kansas Natural Gas Co.*, 265 U. S. 298, and *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83.[17]

(a) *H. R. 5423.*—The first of the predecessor bills designed to provide regulation of the natural gas industry, H. R. 5423, introduced in 1935, con-

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[17] In contrast, there were no comparable holdings that the States are constitutionally without power to regulate any aspect of the production and gathering business. Rather, as appears in the Trade Commission's report, *supra*, pp. 35–37 (see also *infra*, pp. 41–42, 44, 51, 64, 65) these activities were regarded as local in nature and hence, even though in interstate commerce, nevertheless still a proper subject of State regulation. See e. g., *Cooley* v. *Board of Wardens*, 12 How. 298. Cf. *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179, and *Phillips Petroleum Company* v. *Oklahoma*, 340 U. S. 190, where subsequent to the enactment of the Natural Gas Act the Court, citing among others the *Cooley* case, affirmed the constitutional power of the States to regulate well-head sales by producers, although in interstate commerce.

sisted of three titles. Title III dealt with interstate transportation of natural gas.[18]

The declaration of policy contained in Section 301 (a) of this title referred to the "business of selling, transmitting, and distributing[19] as a part of interstate commerce, natural gas for ultimate public consumption" as being "affected with a public interest." Attention was focused upon the "business" of selling and transmitting natural gas. This declaration of policy remained unchanged in all the subsequent bills. Regulation would have extended to the "transmission and sale of natural gas in interstate commerce," but not the "retail sale of natural gas in local distribution."[20] And while there was no express

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[18] Title I dealt with regulation of public utility holding companies, and Title II with interstate commerce in electric energy. A modified version of the bill when reported by the House Committee did not include Title III (H. Rep. No. 1318, 74th Cong., 1st sess., 1935).

[19] The word "distributor" is used in this bill not in the conventional meaning of "local distribution," but more as "natural-gas company" is used in the later bills and the Natural Gas Act. See fn. 20, *infra*, which confirms again that Congress sought to regulate the sales of the pipe-line transmission companies.

[20] Section 301 (b). The section reads in its entirety:

"The provisions of this title shall apply to the transmission and sale of natural gas in interstate commerce, but shall not apply to the retail sale of natural gas in local distribution. The Commission shall have jurisdiction over all facilities for such transmission or sale and over all facilities connected therewith as parts of a system of natural gas transmission situated in more than one State, except facilities for the retail distribution of natural gas, or for the transmission of

exemption of production or gathering, it is to be noted that the language specifically limited jurisdiction to "all facilities for such transmission or sale and over all facilities connected therewith as *parts of a system of natural gas transmission* situated in more than one State * * *".

That the thrust of this bill was to subject the transmission of natural gas to federal regulation is made even more explicit in the Committee Print of the bill (H. R. 5423, Committee Print, June 22, 1935), which revised this section of the proposed legislation to provide:

> SEC. 302. The provisions of this title shall apply to the transmission of natural gas in interstate commerce in natural gas pipe lines and to the sale of natural gas at wholesale for resale in interstate commerce, but shall not apply to any other sale of natural gas. The Commission shall have jurisdiction over all facilities used for such transmission or sale of natural gas but shall not have jurisdiction over low-pressure or service lines.

"Natural-gas pipeline" in this print was defined as "a high-pressure main into which natural gas is delivered from field gathering lines and from which natural gas is taken into low-pressure or

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natural gas solely for the use of the producer or transmitter or the use of his tenants on property owned or controlled by him and not for resale. Every person who owns or operates facilities subject to the jurisdiction of the Commission under this title shall be subject to the provisions of this title. The term 'distributor' when used in this title means any person who owns or operates such facilities."

service lines for local distribution." Sec. 301 (5). A "field gathering line" was defined as a "line through which natural gas is delivered from the wells to the natural-gas pipe line." Sec. 301 (6). Natural-gas company was defined as "a person or company engaged in the transmission of natural gas in high-pressure mains in interstate commerce." Sec. 301(8). These definitions provide unmistakable evidence of the congressional intent to regulate only the transportation of natural gas in high pressure mains into which gas is delivered from the field gathering lines, and the sales of gas by companies engaged in such transportation. The gathering business at the one end and the local distribution business at the other end of these transmission lines were not to be regulated by a Federal commission.

Hearings on H. R. 5423 related principally to the first two titles of the bill. However, there was some testimony by State public utility commissioners, who were interested in the passage of Title III. These witnesses asserted that most of the business of the gas industry was local and should not be subjected to Federal regulation. For example, Mr. John E. Benton, General Solicitor of the National Association of Railroad and Utility Commissioners, emphasized that the natural-gas industry was "predominantly local and subject to State control. Transportation and sale at wholesale alone escapes State control." He pointed out that whereas in the railroad field 80

or 90 per cent of the volume of business was interstate in character, "the situation is exactly the opposite in the utility field, where 80 or 90 per cent of the business is local and intrastate. * * * That section of this bill which relates to natural gas recognizes this distinction and aims to fill the gap without invading the local field."[21] He concluded by expressing concern over the possibility of judicial extension of Federal authority into an area not intended by Congress.[22]

(b) *H. R. 11662.*—This bill, characterized by this Court in *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 505, as "substantially similar to the Natural Gas Act,"[23] was introduced in the House in 1936. This

[21] Hearing before the Committee on Interstate and Foreign Commerce of the House of Representatives on H. R. 5423, Part 3, 74th Cong., 1st sess. (1935), pp. 1633–1634.

[22] At page 1624 he stated:

"When Congress passed the Act to regulate commerce in 1887 it placed in the first section of that act this seemingly explicit provision:

" 'Provided, however, that the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid.'

"Yet, notwithstanding that declaration, a provision in the third section of the Act forbidding discrimination against persons or places was construed to give the Interstate Commerce Commission the power over intrastate rates which was exercised in the Shreveport case, and today State jurisdiction has become not much more than a shadow in the railroad field. The State commission does not wish to repeat that experience in the utility field."

[23] In holding in that case that gas leases were exempt from Federal regulation as an incident to production and gather-

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bill and the hearings thereon made clear the intent of Congress to subject to Federal regulation only those activities in the middle division of the natural-gas industry, that is, the interstate transmission of natural gas by pipeline companies and the sales of such gas by the companies at wholesale.

Section 1 (a) of this bill, containing the congressional statement of policy, referred, as did the corresponding section of the earlier H. R. 5423, to "the business" of transporting and selling natural gas for ultimate distribution to the public as being affected with a public interest. Section 1 (b) provided for regulation of "the transportation of natural gas in high-pressure mains in interstate commerce and to natural-gas companies engaged in such transportation," but not "the distribution of natural gas moving locally in low-pressure mains or to the facilities used for such distribution or to the production of natural gas." A "natural-gas company" was defined as "a person engaged in the transportation of natural gas in high-pressure mains in interstate commerce." Sec. 2 (5).

The House Committee on Interstate and Foreign Commerce held public hearings on H. R. 11662 in April, 1936. No witness suggested at this time—or indeed at any other time in the

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ing, this Court quoted from and expressly relied on testimony given during hearings on H. R. 11662 in ascertaining the intent of Congress with respect to the Natural Gas Act.

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Act's legislative history—that the proposed legislation either did or should provide for regulation of the business of production or gathering or any part thereof. Repeated testimony to the contrary was given by Mr. Dozier A. DeVane, then Solicitor for the Federal Power Commission, who had been loaned to the Committee to assist in drafting the bill. This Court, in the *Panhandle* case (*supra*) relied on his testimony as revealing the intent of Congress, saying (337 U. S. at 505, fn. 7):

> In a brief prepared by the Solicitor of the Federal Power Commission for the House Committee on Interstate and Foreign Commerce on the constitutionality of H. R. 11662, an earlier bill substantially similar to the Natural Gas Act, the following appears as part of the analysis of the bill: "The bill makes no attempt to regulate the production or gathering facilities of a natural-gas company, this function being purely local in character * * *."
>
> The Solicitor of the Federal Power Commission in testifying at the same hearing also answered the following question:
>
> "Mr. COLE [Member of Committee] Does this bill give anywhere the Commission power over the source of natural gas in the different fields in a manner which we might call comparable to that which your Commission now has over hydroelectric generating plants?

> "Mr. DeVane [Solicitor of the F. P. C.]. It does not; no. It does not attempt to regulate the *gathering rates or the gathering business.* * * *" [Italics supplied.]

In addition to the excerpt thus quoted by the Court, Mr. DeVane at other points in his testimony reiterated that Section 1 (b) would preclude regulation of the sales of gatherers. Thus, he further stated:[24]

> Mr. DeVane. * * * Now, section 1 (b) also provides that the Commission shall have no jurisdiction over the gathering or gathering rates for natural gas.
>
> Mr. Cooper [Member of Committee]. What do you mean by gathering rates?
>
> Mr. DeVane. The rates that are paid in the gathering field, Mr. Cooper.

And he subsequently made it clear that the "gathering rate" which was meant to be exempt was the rate paid *to* the gathering company by the interstate transmitting company, as the following colloquy shows (*id.* at 42–43):

> Mr. Lea [Chairman of Subcommittee]. Mr. DeVane, I would like to go back just a moment. Of course, it is a question of regulation. Suppose that the A company owns a gas supply and the B company transmits it to another State, distributes it to a local company for distribution. Now suppose

[24] Hearing before a Subcommittee of the House Committee on Interstate and Foreign Commerce on H. R. 11662, 74th Cong., 2d sess. (1936), p. 28.

the question arises as to whether or not the charges which the A company makes against the B company for the gas is reasonable. What, if any, authority would the Commission have on that question, under this bill. Do you get my question?

Mr. DEVANE. Yes; if I understand your question, *concerning the price paid to the A company, there is no control of the gathering rate;* the Commission would not have jurisdiction. That price is fixed by competitive conditions that exist in the field. But it matters not how many different ownerships there may be between the time gas starts to move in interstate commerce and gets to the city gates. Ownership might change a dozen times—A company sell to B, and B company sell to C—all those rates would be subject to regulation.

Mr. LEA. Well, when the supply company is brought before the Commission in an action to regulate its rates, and they say, "We have got to pay so much for gas; we cannot control that price which they charge us, and we have to charge a higher delivered price to the buyer."

Does the Commission have any power over that?

Mr. DEVANE. No; *not the price that is paid to the gatherer,* to the man that produces it; that is binding if the transaction is at arm's length. If the transaction is not at arm's length, of course, its reasonableness may be inquired into, under the decisions of the Supreme Court. [Italics supplied.]

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No other witness nor member of the Committee took issue with Mr. DeVane's repeated and unequivocal view as to the exempt status of sales by producers and gatherers. Mr. John D. Battle, testifying for the bituminous coal-mining industry, expressed the common understanding when he said (*id.* at 72):

> Consequently, the only phase of the industry, as I see it, that it is proposed to regulate is after the gathering ceases and the gas is turned into a main line, so to speak, until it reaches the city gate, and only then when it is moving in high-pressure mains across State lines.
>
> If I am wrong in this interpretation of the bill, I hope that I may be corrected now.

No one undertook to correct him.

Mr. DeVane had stated prior to the testimony of Mr. Battle that the "whole purpose" of the bill was "to bring under Federal regulation the pipelines" (*id.*, at 24). Testifying regarding the purpose of the various sections of the bill, he constantly referred to the "interstate pipelines" or the "pipeline companies." In connection with Section 6 (a), he pointed out that the Commission would be authorized to ascertain the actual legitimate cost of the property "owned by these pipeline companies" (*id.*, at 31). Discussing Section 7, he commented that the Commission would have authority to require extensions from the "pipe-

lines," and to "require a pipeline company to furnish gas to a local distributing company" (*id.*, at 37, 40–41).

Federal regulation was not intended to supersede State regulation. The bill did not attempt to prevent the waste of gas despite the importance of this problem, since that was a matter for State regulation (*id.*, at 34–36). Both State and Federal regulation were considered essential; but it was intended that the latter should extend only to the gap in regulation consisting of the interstate transmission of gas and its sale by the pipeline transmission companies. Mr. DeVane stated his view as to this basic purpose of the bill as follows (*id.*, at 41):

> The real question we are dealing with here is this: There is a complete hiatus in the regulation of rates charged by these pipeline companies to the local distributors of gas throughout the United States, and we are trying to augment State regulation by conferring authority upon a Federal Agency to fix those rates.

(c) *H. R. 12680 and House Report 2651.*—H. R. 11662 was revised by the House Committee on Interstate and Foreign Commerce, and reintroduced on May 12, 1936, as H. R. 12680 of the 74th Congress, 2d session. It was accompanied by House Report No. 2651. Section 1 (a) of this bill remained unchanged but Section 1 (b) was revised considerably.

H. R. 11662 had provided for the exemption of "the production of natural gas." H. R. 12680 broadened the exemption so as to exclude "the production *or gathering* of natural gas." This revision was consistent with Mr. DeVane's testimony at the hearing on H. R. 11662, that "the gathering business" and "gathering rates" were intended to be excluded from Commission regulation. Its obvious purpose was to make clear that the bill meant what Mr. DeVane had said.

The affirmative provisions of Section 1 (b) were also changed to their present form.[25] H. R. 11662 had provided for regulation of "transportation of natural gas in high-pressure mains in interstate commerce and to natural-gas companies engaged in such transportation." This was changed to provide for regulation of "the transportation of natural gas," the "sale of such gas for resale to the public," and of "natural-gas companies engaged in such transportation or sale."[26]

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[25] This Court has already noted the lack of material difference between H. R. 11662 and the Natural Gas Act, *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 505. See *supra*, pp. 42–43, 44. The jurisdictional provisions of the subsequent H. R. 12680 are even more like those in the Act. See fn. 26, *infra*.

[26] Section 1 (b), H. R. 12680, in its entirety read:

"(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale of such gas for resale to the public, and to natural-gas companies engaged in such transportation or sale, but shall not apply to the local distribution of natural gas or to the facilities used for such distribution or to the production or gather-

There is nothing to indicate that Congress intended by these changes in language to enlarge the scope of the proposed regulation of the natural-gas industry. No further hearings were held on the bill, but it was accompanied by a committee report. This report on H. R. 12680 (H. Rep. No. 2651, 74th Cong., 2d Sess.), although not explicit on the present point, shows that Congress intended H. R. 12680 to provide federal regulation of the same subject matter as in the earlier bills, that it was desired to reach the activities of the interstate pipeline transmission companies, not those matters which were subject to State control. The report stated (p. 2):

> Under the decisions of the United States Supreme Court rates charged in interstate wholesale transactions may not be regulated by the States. Such transactions are defined in this bill to mean sales of natural gas for resale. The Commission is given no jurisdiction over local rates even where the natural gas moves in interstate commerce.
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> * * * * *

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ing of natural gas: *Provided*, That nothing in this Act shall be construed to authorize the Commission to fix the rates or charges to the public for the sale of natural gas distributed locally or for the sale of natural gas for industrial use only."

Section 2 (5) provided:

"'Natural-gas company' means a person engaged in the transportation of natural gas in interstate commerce, or the sale of such gas for resale to the public * * *."

> The bill takes no authority from State commissions and is so drawn as to be a complement, and in no sense an usurpation, of State regulatory authority * * *.

The appearance of Mr. John E. Benton, General Solicitor of the National Association of Railroad and Utility Commissioners, before the subcommittee was noted, and the following statement by the Chairman of the State Corporation Commission of Kansas was stated to represent the attitude of State regulatory commissions (*id.* at pp. 2–3):

> "* * * There are a number of towns in Kansas where the interstate company sells gas at the city gate to individual companies, and in those cases we have no power whatever to determine the fairness of the gate rate. In other words, in determining rates to consumers in those cases there is one major factor of cost, namely, the cost of gas at the city gate over which neither the State commission nor any Federal authority now has any control. * * *"
>
> Your committee believes this legislation useful and very desirable *to fill the gap in regulation that now exists by reason* of the lack of authority in the State commissions over interstate transportation. [Emphasis supplied.]

These passages show what it was understood this proposed bill would regulate.

(d) *H. R. 4008 and Hearings Thereon.*—No action was taken by the 74th Congress on H. R. 12680. Early in 1937, Chairman Lea introduced

H. R. 4008, 75th Congress, 1st session, which was later designated H. R. 6586 and passed as the Natural Gas Act. The bill in form was identical with H. R. 12680.

Hearings were held on H. R. 4008 by the House Committee during March, 1947. The testimony respecting H. R. 4008 reflects an increasing awareness that in some instances the pipeline transmission companies produced their own gas, just as in some instances they controlled the local distributing companies (*id.*, at 39). Congressman Pettengill, a member of the Committee, addressed the following question to Mr. Booth, representing the Illinois Commerce Commission, after the latter had testified that his Commission had no power to determine what Natural Gas Pipeline Company of America, a pipeline transmission company selling to a local distribution company in the Chicago area, should collect from the local distributor:

> Mr. PETTENGILL. It is not clear to me what you mean by the wholesale interstate rate. Is that a tariff charged by a company that is engaged in the business of a common carrier, or does it apply to a company that is transporting and selling its own gas?

Mr. Booth replied that "It does not make any difference," that:

> The wholesale rate which is covered by the Act would cover, as I understand it, any wholesale rate or charge under which either

> a transmission company or a *producing and transmission company sells* natural gas and which transmits it in interstate commerce to *either a distributing company or another wholesale company.* [Emphasis supplied.]

There was no constitutional objection to such legislation, he explained (*id.*, at 40):

> * * * These companies are supplying gas service and are rendering a service that is dedicated to the public under common law, to public use, and the right of the Government, State or Federal, under appropriate circumstances to regulate the prices under which a company that is devoted to public service, like a gas company or an electric company, or a railroad company, is unquestioned.

These statements, while fully applicable to interstate pipeline transmission companies, or to such transmission companies which are also producers, were not directed to the independent producers and gatherers of gas. The description of what was intended to be covered is of significance for what it does not mention as well as for what it does. Plainly, there was no intention to expand coverage in the area before and after interstate transmission beyond that agreed upon in the earlier bills.

(e) *H. R. 6586 and House Report 709.*—After the hearings on H. R. 4008, some changes were made on that bill but it was never reported out. Instead it was reintroduced as H. R. 6586. The

latter bill was reported to and passed by the House (House Report No. 709 to accompany H. R. 6586, 75th Cong., 1st Sess.), sent to the Senate, reported out there,[27] amended,[28] debated and passed. Section 1 (a) of H. R. 6586 was the same as 1 (a) in H. R. 4008.[29] Section 1 (b) was changed in minor ways to read as it does in the Act.[30]

House Report 709 calls attention to legislative history anteceding H. R. 6586. It states that the bill was originally introduced as H. R. 4008, and describes it as "substantially identical" to H. R. 12680. This, of course, indicates that Congress meant that the subjects of Commission regulation were to be the same as in the earlier bills. House Report 709 in many particulars closely parallels House Report 2651 on H. R. 12680, *supra*, pp. 50–51.

The Report reiterates the intention that "If enacted, the present bill would for the first time provide for the regulation of natural-gas companies transporting and selling natural gas in interstate commerce" (*id.*, at 1), and goes on to

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[27] Senate Report 1162, 75th Cong., 1st Sess. (1937). The Senate Committee adopted the report of the House Committee.

[28] Those amendments are not relevant here.

[29] Here as in earlier bills, attention was called to the Federal Trade Commission Reports, and it was declared that "the business" of transporting and selling natural gas is affected with a public interest.

[30] H. R. 4008, 75th Cong., 1st Sess., Confidential Committee Print No. 1, April 22, 1937, showing subcommittee amendments.

describe the affirmative provisions in Section 1 (b) as follows (at pp. 1–2):

> The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibition subject to State regulation. (See *Pennsylvania Gas Co.* v. *Public Service Commission* (1920), 252 U. S. 23.) There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction. However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character and, even in the absence of Congressional action, not subject to State regulation. (See *Missouri* v. *Kansas Gas Co.* (1924), 265 U. S. 298, and *Public Service Commission* v. *Attleboro Steam and Electric Co.* (1927), 273 U. S. 83.) The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held the States may not act.

The latter half of this excerpt together with an isolated statement by Senator Wheeler which, when read in context (see p. 62, *infra*), supports

the Commission's position are the sole portions of the Act's legislative history referred to by the court below. On the basis of this reference, plus its reading of *Missouri* v. *Kansas Gas Co.* and the *Attleboro* case, the court below concluded that sales by independent producers and gatherers, such as those by Phillips here involved, were within the gap which Congress intended to close by its enactment of the Natural Gas Act.

But the *Missouri* and *Attleboro* cases did not involve sales by independent producers and gatherers at the end of the gathering processing. In *Attleboro* the sales of electricity held to be beyond the regulatory power of the States were made in the course of interstate transmission, and are not at all comparable to the present situation. And while the vendor in the *Missouri* case was engaged in production and gathering (which accounts for the House report's reference to "producing company"), it also was engaged in the interstate transportation of natural gas. Moreover, the case involved sales to distributing companies, made long after production and gathering had been completed and after the gas had been transported in interstate commerce. The Court's opinion emphasizes transportation aspects of the vendor's activities. This, rather than the fact that the selling company was also a producer, was the significant feature of the case. Neither the *Missouri* case itself nor the House Commit-

tee's reference to it can be said to suggest that the gap which Congress was trying to fill extended back to the sales by independent producers and gatherers to the transmission pipeline companies. Certainly, there is no intimation in this Committee Report that the bill as enacted was meant to have a coverage much broader than the substantially identical bills, the limited scope of which had been made clear in the earlier legislative history to which reference has been made. Read in historical context the passage in the report relied on by the court below cannot have been intended to have any different meaning than the earlier statements.[21] Any doubts as to this are removed by the debates in Congress discussed immediately below.

(f) *Debates on H. R. 6586.*—The debates in the House and Senate reflect an understanding of the legislators of the purpose and coverage of the bill fully in accordance with the earlier history. The economic functions performed by the separate divisions of the industry, the need for remedial regulation to control the monopolistic practices of the transmission pipelines with regard to their sales, after transmission, to local distribution companies at the city gate, and the necessity for com-

[21] The report itself notes approval of the bill by the Executive Committee of the National Association of Railroad and Utilities Commissioners (H. Rep. No. 709, *supra*, pp. 2–3), an organization which would undoubtedly have protected limitation of the jurisdiction of the States. See pp. 41–42, 51, *supra*.

plementary Federal and State regulation, all were again discussed on the floor of Congress. In contrast sales by independent producers and gatherers were nowhere mentioned as needing federal legislation nor as being within the Act's coverage.

In the House, Representative Halleck, after pointing out that the local distribution companies are subject to State regulation, stated (81 Cong. Rec. 6723):

> * * * the transportation of gas in interstate commerce in the pipe lines and its sale to the distributing companies for resale is not subject to State regulation, and as a result, we have had a situation under which the price charged the distributing company at the city gate has been fixed wholly by the judgment, discretion, or action of the interstate company. It is charged that in many cases that price is excessive. This bill seeks to regulate those prices.

Correspondingly, Mr. Lea, Committee Chairman and principal sponsor of the legislation, indicated the field intended to be regulated as the transportation of gas and its sale by interstate pipeline companies, stating:[32]

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[32] *Id.*, p. 6721. Others pointed to instances of the "monopoly" position occupied by the pipeline companies, *e.g.*, the statement by Representative Cole at p. 6724. In this connection, Representative Cole described the problem in the natural-gas industry giving rise to the need for regulation as being one of "an industry * * * charging what they please at the city gate, a price determined by a private contract with a local company under regulation as to everything

> The primary purpose of the pending bill is to provide Federal regulation, in those cases where the State commissions lack authority, under the interstate-commerce law. This bill takes nothing from the State commissions; they retain all the State power they have at the present time.

Continuing, he said:

> This bill would apply to the transportation of natural gas in interstate commerce and to the sale of natural gas in interstate commerce for resale for public consumption.

Throughout the ensuing discussion, it is apparent that Mr. Lea considered the "transportation" and "sale" subject to Commission jurisdiction to be the transportation and sale of interstate pipeline transmission companies, and regarded "natural-gas companies" as synonymous with pipeline companies. In response to a question by Representative Thompson of Illinois whether there was anything in the bill which would result in regulation of purchases by an industrial consumer from a "pipe-line company," Mr. Lea responded:[33]

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except the price paid to the interstate activity coming from the Panhandle and other parts of the country, which the courts locally cannot reach."

[33] *Id.*, p. 6721.

Shortly after, in response to a question by Representative Greever whether "where * * * each of two States has a public-service commission with jurisdiction of pipe lines this bill in no way affects their control of gas flowing through these pipe lines?", Mr. Lea replied, "This bill would not affect the local distribution of gas, but it might affect the

> Not unless it falls within the class of public consumption. A natural-gas company engaged in the transportation or sale of gas, as I have just indicated, is subject to regulation under this bill.

As to the intended subject of regulation, Representative Halleck said that "Any purchase from an interstate carrier by a distributor for the purpose of resale for ultimate public consumption would be reached." (*Id.*, p. 6723.) [34]

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city-gate rate that the local company would pay if it bought from an interstate company," and "So far as the interstate price is concerned, it may very materially affect it. The interstate price would be subject to regulation by the Federal Power Commission. The city-gate rates in an interstate shipment could be controlled by the Federal Power Commission under this bill."

Mr. Greever then asked: "In other words it would take the power away from the State commission to that extent?" Mr. Lea then stated that "The State commission does not have that power now." And he continued: "The object of this bill is to supply regulation in those cases where the State commission has no power to regulate"—referring obviously to the situation he had just described, involving "city-gate" regulation. He said: "There are, however, some situations defined in the bill to which this regulation does not apply. One is local distribution * * *. So this act does not affect the local distribution of gas. *It affects the local consumer's price only by regulating the price at the city gates.*" [Emphasis supplied.]

[34] *Id.*, p. 6723. The other members of Congress had the same view of the Act's coverage. Accordingly, much of the discussion respecting the intended scope of regulation under the bill centered on the "city-gate rate that the local company would pay if it bought from an interstate company." Representative Cole of Maryland, referring to "pipe line

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Representative Mapes declared that (*id.*, p. 6726):

> It [the bill] gives the Federal Power Commission power to fix the cost of the transportation of natural gas shipped in interstate commerce and the wholesale price which may be charged for it at the consuming centers.[35]

Representative Wolverton had earlier expressed the view respecting the intended coverage of the bill's provisions that (*id.*, at 6723):

> The State regulatory bodies have wide and comprehensive jurisdiction to fix rates and otherwise regulate and control the sale of natural gas to consumers within the State but do not have any jurisdiction in fixing the rate to the distributing company or the municipality when the purchase of gas is made from an outside source. This comes within the field of interstate commerce and the jurisdiction over such is denied entirely to the State regulatory bodies and lodged completely in the Federal Congress.

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regulation" and the need to improve the "rate structure at the city gate," said:

"Upon the passage of this bill, a company enjoying, you might say, a monopoly in the city of Chicago, if but one line serves that city, would be forced to charge a fair and reasonable rate * * *" (*id.*, p. 6724).

[35] Representative Kenney of New Jersey said that the legislation was necessary because of the great difficulty State commissions had had in fixing reasonable rates for consumers, "for the reason that State commissions have had no power over the interstate activities of the pipe-line companies" (*id.*, p. 6726).

The fact that this "field" was the gap in regulation, and that Federal regulation was intended to extend to this gap only, is made even more explicit in the discussion of the bill in the Senate. At the very outset, Senator Austin asked Senator Wheeler, Chairman of the Senate Committee (81 Cong. Rec. 9312):

> Does the bill undertake to regulate the production of natural gas or does it undertake to regulate the producers of natural gas?

Senator Wheeler, in the sentence quoted by the court below, replied:

> It does not attempt to regulate the producers of natural gas or the distributors of natural gas; only those who sell it wholesale in interstate commerce.

Senator Austin pursued the matter further. He asked, "Is the bill limited in its scope to the regulation of transportation?" Senator Wheeler replied, "Yes; it is limited to transportation in interstate commerce, and it affects only those who sell gas wholesale" (*id.*, p. 9312). Later, he described at length a "purpose of the bill" as being to help the State commissions find out "what is the cost of transporting natural gas to the larger cities." The lack of power he referred to as follows (*id.*, p. 9314):

> It does not do any good to give the Illinois commission the power to regulate the price of gas in the city of Chicago if they can be

> held up—and that is all it is—by pipe-line companies which ship the gas to Chicago and be told, "It is going to cost the city of Chicago so much at wholesale for this gas." What good does it do the people of Chicago if they cannot reach the wholesale price and do something to regulate the pipe-line companies which transport the gas into the city of Chicago?

Accordingly, the "only purpose of the bill" was to help the states secure effective regulation by closing this gap in the industry. The bill was to provide effective regulation of the company which "ships the gas" and its charges, e. g., to the City of Columbus or the City of Cleveland (*id.*, p. 9313), the "wholesale prices that the pipe-lines charge," and the "wholesale rate that is charged at the gate" (*id.*, p. 9315). And it was considered that the production of gas [36] and the distribution of gas [37] would enter into such regulation, if at all, only indirectly as to those instances where the pipe-line interests controlled either production or distribution.

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[36] Cf. the question by Senator Connally at p. 9314, "if a man should produce gas in my State and ship it in interstate commerce, then he would have to sell it at the price fixed by the Commission?" to which Senator Wheeler replied, "Exactly; at the wholesale price fixed by the Commission."

[37] At pp. 9314–9315, Senator Clark said in this connection that the bill is "designed on the theory of preventing the situation which now exists, by which a chain or a system may deliver gas at a State line to a company owned by this system," and ignore the local utility commission in its efforts to ascertain the facts on the basis of which to set rate.

(g) *Summary of legislative history.*—This review of the history of the Natural Gas Act shows that prior to its enactment, the monopolistic pipeline companies were engaged in practices harmful to the independent producers and gatherers of natural gas as well as to the local distribution companies and ultimate consumers. The Act was intended to correct these evils through federal regulation, inasmuch as the States under the earlier decisions of this Court were constitutionally without power to act in regard to these interstate activities.

In sharp contrast to the situation in the central or transmission division of the industry, the production and gathering division was highly competitive, with competition operating to keep prices at a fair and reasonable level. It was generally assumed that the activities of production and gathering, including the sales of gas made at the termination thereof, were local in character and subject to state regulation. While there are repeated references to the need for federal regulation of the pipeline companies, nobody at any time that the Act was under Congressional consideration suggested that the federal Government should regulate any phase of the production and gathering business; on the contrary, there is clear manifestation of an intent not to impose federal regulation upon these activities. Due regard for the history of the Act thus requires that it be construed, in the light

of the mischief it was meant to remedy, to exempt the activities of the independent producers and gatherers from federal regulation.

B. THE COMMISSION HAS UNIFORMLY INTERPRETED THE ACT TO EXCLUDE TRANSPORTATION AND SALES SUCH AS THOSE HERE INVOLVED

The Commission from the very inception of its administration of the Natural Gas Act of 1938, has consistently held that Congress has not delegated to it power to regulate the business of production and gathering, including sales made at the termination thereof to a transmission pipeline company. The Commission has uniformly held that such sales are within the production and gathering exemption contained in Section 1 (b) of the Act. The Commission stated in its opinion (R. V 1720–1721), "[i]n no case in its history has this Commission held that the Act gives it jurisdiction over a company solely by reason of its movement of gas in interstate commerce or sales in interstate commerce for resale, where such movement or sales take place in the process of production or gathering." Commission regulation under the Act has extended only to interstate transportation and interstate sales *after the completion* of production and gathering and before the beginning of local distribution. Sales made during or immediately upon the completion of production and gathering and as a part of that business have consistently been held exempt. *Columbian Fuel Corporation,* 2 F. P. C.

200 (1940); *Billings Gas Co.*, 2 F. P. C. 288 (1940); *Interstate Natural Gas Co., Inc.*, 3 F. P. C. 416 (1943); *The Fin-Ker Oil and Gas Production Co.*, 6 F. P. C. 92 (1947); *The Chicago Corporation*, 6 F. P. C. 98 (1947); *Kansas-Nebraska Natural Gas Co., Inc.*, 6 F. P. C. 664 (1947); *R. J. and D. E. Whelan*, 6 F. P. C. 672 (1947); *Hassie Hunt Trust*, 6 F. P. C. 835 (1947); *Sinclair Prairie Oil Co.*, 6 F. P. C. 1059 (1947); *La Gloria Corporation*, 7 F. P. C. 349 (1948); *Superior Oil Company*, 7 F. P. C. 627 (1948); *General Crude Oil Company*, 7 F. P. C. 1024 (1948).

The interpretation of a statute by the agency which administers it is entitled to great weight in determining the existence of a questioned agency power. *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 513; *Federal Trade Commission* v. *Bunte Brothers*, 312 U. S. 349, 351, 352; *Norweigan Nitrogen Prod. Co.* v. *United States*, 288 U. S. 294, 315; *United States* v. *American Trucking Associations*, 310 U. S. 534, 549; see Gellhorn, *Administrative Law, Cases and Comments* (2d Ed., 1947), p. 204; *United States* v. *California Public Utilities Commission*, 345 U. S. 295, 314–315. This Court, in the *Bunte Brothers* case, pointed to the refusal of an agency to assert a questioned power as a "powerful indication" that such power is lacking (312 U. S. at 351–352). Likewise, in the *Panhandle* case, the Court noted in a comparable situation (337 U. S. at 513) "Thus for over

ten years the Commission has never claimed the right to regulate dealings in gas acreage."

The Commission's interpretation of the provision of the Act here involved began with *Columbian Fuel Corporation,* 2 F. P. C. 200 (1940), which presented the identical question. The decision in that case was made scarcely two years after the Act was approved, at a time when four of the five Commissioners had been in office both when the Act was passed and when predecessor bills were under consideration in Congress. In that case Columbian sold gas to an interstate transmission pipeline company from the termini of Columbian's gathering lines, and from its compressor station adjacent to some of the producing areas. The Commission held that it did not have jurisdiction over such sales, saying (2 F. P. C. at 207):

> Clearly, Congress thought it was closing the gap in regulation of the natural-gas industry by providing Federal Power Commission regulation of companies whose main function was to transport natural gas through interstate pipe lines and sell gas so transported at city gates for resale to ultimate consumers.
>
> The companies to be subjected to regulation were conceived of as "pipe line" companies, and it was assumed that production and gathering would enter the field of regulation only to the extent that the "pipe line" companies, either directly or through affil-

iates, controlled the production or gathering of the gas so transported.

The Commission concluded (p. 208):

> * * * that it was not the intention of Congress to subject to regulation under the Natural Gas Act all persons whose only sales of natural gas in interstate commerce, as in this case, are made *as an incident to and immediately upon completion of such person's production and gathering of said natural gas* and who are not otherwise subject to the jurisdiction of this Commission. [Emphasis supplied.]

The Commission has adhered to this construction. In *Billings Gas Company*, 2 F. P. C. 288, it reaffirmed its earlier conclusion that a corporation which "engaged in the production and gathering of natural gas and [which] made disposition of its product immediately upon completion of these operations" came within the Section 1 (b) exemption. The Commission pointed out that (2 F. P. C. at 289):

> A person, however, engaged in the production and gathering of natural gas *and the subsequent transportation,* or *transportation and sale,* thereof in interstate commerce, would not fall within the same category. [Emphasis supplied.]

Accordingly, after finding that the Billings Company and other companies there involved engaged in such transportation, or transportation followed

by sale, the Commission found them to be "natural-gas companies" subject to its regulation.

The Commission in 1943 in *Interstate Natural Gas Co., Inc.*, 3 F. P. C. 416, asserted jurisdiction over certain sales by Interstate on complaint of the Louisiana Commission. The jurisdictional dispute involved Interstate's sales of gas in the Monroe field in northern Louisiana to three interstate pipeline transmission companies. Interstate, which was admittedly a "natural-gas company" by reason of operations other than the sales in question, produced and gathered gas of its own and also purchased gas from others in the Monroe field. Thereafter, as the Commission found (3 F. P. C. 420):

> Interstate transports the gas which it buys from such companies in the Monroe field and commingles that gas with gas which it has produced and gathered in the Monroe field, and then transports this commingled gas to the points of sale and delivery in Louisiana to the Mississippi River Fuel Corporation, Southern Natural Gas Company, and United Gas Pipe Line Company for the account of Memphis Natural Gas Company.

Interstate's activities thus constituted the "production and gathering of natural gas and [also] the subsequent transportation, or transportation and sale" to which reference was made in the *Billings Company* case. The fact of subsequent transportation or transportation and sale in addi-

tion to its production and gathering accordingly was the basis of the Commission's decision subjecting Interstate to jurisdiction and regulation."

After this Court had affirmed the Commission's order in the *Interstate* case, in a decision discussed at pp. 81–88, *infra*,[29] the Commission handed down a number of decisions adhering to its prior administrative interpretation of the Act. The Commission again in *Fin-Ker Oil and Gas Production Company*, 6 F. P. C. 92, 94 (1949), had before it the question whether it had jurisdiction over a company whose "natural gas operations are confined to the production and gathering and the sale upon completion of gathering." The Com-

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[28] The further statement of the Commission in *Interstate* referred to by the dissenting Commissioner (R. V 1806) is not to the contrary when read in the context of the Commission's finding that the sale occurred after the gas was transported in interstate commerce subsequent to the completion of production and gathering. Similarly there is nothing inconsistent in the Commission's actions in *The Peoples Natural Gas Co.*, 2 F. P. C. 704, considered in *Peoples Natural Gas Co.* v. *Federal Power Commission*, 127 F. 2d 153 (C. A. D. C.), certiorari denied, 316 U. S. 700; 5 F. P. C. 761. That case never went beyond the preliminary stage of Commission investigation into whether the company was a natural-gas company, and the Court held that in the course of such an investigation the Commission was entitled to subpoena the records of the company showing the cost of service. Moreover, the sale there involved was to an affiliate which transported the gas in interstate commerce prior to resale and consequently squarely within the exception recognized by the Commission in the *Columbian* case, *supra*, pp. 67–68.

[29] Cf. *Interstate Natural Gas Co., Inc.* v. *Federal Power Commission*, 156 F. 2d 949 (C. A. 5), affirmed, 331 U. S. 682.

mission was consistent in concluding that (6 F. P. C. at 98):

> where a person not otherwise subject to the jurisdiction of the Commission, is engaged in production or gathering of natural gas exclusive of its transportation in interstate commerce and makes arm's-length sales and deliveries of natural gas in interstate commerce as an incident to or upon completion of that person's production or gathering, the provisions of the Natural Gas Act do not apply.

Similarly, in the *Chicago Corporation* case, 6 F. P. C. 98 (1947), the Commission, pointing to its decision in the *Fin-Ker* case that it had no jurisdiction over sales made "as an incident to or upon completion of that person's production or gathering," held that Chicago's operations did not constitute it a "natural-gas company." It said that Chicago (p. 103):

> * * * has no transmission facilities. It is a company engaged primarily in the production, gathering and processing of natural gas and the delivery and sale of such gas at the outlets of cycling plants or direct from wells into field or transmission lines owned by others.

This position the Commission has maintained consistently in all subsequent cases. See *supra*, p. 66.

Notwithstanding this uniform course of interpretation revealed by decided Commission cases, there has been some uncertainty as to the applicability of the "gathering" exemption to the situa-

tion here involved. The broad language of the Court of Appeals for the Fifth Circuit in the *Interstate* decision, 156 F. 2d 949, 951–952, added to the doubt. This Court, in affirming, declared that it was not passing on the "validity of the jurisdictional tests employed by the Commission" in the *Columbian* and *Billings* cases, 331 U. S. 682, 690–691, thereby leaving the point open. The Commission, to allay all doubts and to reaffirm its past construction of the Act, issued its Order No. 139, 12 F. R. 5585, on August 15, 1947, so that there might be "no basis for misunderstanding or continuing expressions of fear and uncertainty regarding this matter." The Commission stated that it "is of the opinion that it was the intent of the Congress that the control of production or gathering of natural gas should remain a function of the States and that the Natural Gas Act should not provide for regulation of those subjects," and that "For the purpose of administering the Natural Gas Act, the Commission will construe the exemption contained in Section 1 (b), to the effect that the provisions of the act shall not apply to the 'production or gathering' of natural gas, as including arm's-length sales of natural gas, by independent producers and gatherers, made during the course of or upon completion of production and gathering (12 F. R. 5585–5586).

The Commission in 1948 handed down three additional decisions consistent with Order No. 139 and prior decisions of the Commission.[40] Then, in light of the President's veto of H. R. 1758[41] and the pendency of the proceeding in the present case culminating in the order here involved, the Commission in 1950 rescinded Order No. 139.[42]

The court below failed to mention, let alone give any weight to, this long-continued and consistent interpretation placed upon the Act by the administrative agency charged with the duty of administering the Natural Gas Act. But the Commission's uniform disclaimer of jurisdiction, since the early days of the Act, over sales by independent producers and gatherers is a significant factor in the construction of the statute.

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[40] *La Gloria Corporation*, 7 F. P. C. 349, *Superior Oil Company*, 7 F. P. C. 627, *General Crude Oil Company*, 7 F. P. C. 1024.

[41] The bills introduced in Congress during 1947–1948 designed to place varying limits on the Commission's jurisdiction were detailed by the Commission in its opinion (R. V 1723). During the second session of the Eightieth Congress, H. R. 4051, the so-called Moore-Rizley bill, was passed by the House but not the Senate. Later, H. R. 1758, the House version of the so-called Kerr bill, was passed by both the Senate and the House during the Eighty-first Congress. This bill was vetoed by the President on April 15, 1950. See H. Doc. No. 555, 81st Cong., 2d Sess. (1950).

[42] Order No. 154, issued July 13, 1950 (15 F. R. 4633).

C. THE COMMISSION'S DETERMINATION THAT THE SALES WERE A PART OF "GATHERING" IS BINDING UPON THE COURTS BECAUSE IT HAS REASONABLE BASIS IN LAW AND IS SUPPORTED BY THE EVIDENCE

The Natural Gas Act does not explicitly define the terms "production or gathering" contained in the exempting provisions of Section 1 (b) of the Act. The statute does not state the criteria for determining what elements shall fix the character of "production or gathering" in relation to the Act's coverage. Congress thus left the matter of definition to the expert judgment of the Commission, subject to judicial review in the event of an abuse of administrative discretion in this regard. Under the statute, the Commission was charged with the responsibility of using its judgment in applying the statutory standard of "production or gathering" to the facts of the case. This is particularly true where a term, like "gathering," which has a specialized meaning in an industry, is used for then the determination of the coverage of the Act may depend upon appraisal of evidence as to what that specialized meaning is. *O'Hara* v. *Luckenback S. S. Co.*, 269 U. S. 364, 371; *Order of Conductors* v. *Swan*, 329 U. S. 520, 525.

This Court has often held that "where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited,"

National Labor Relations Board v. *Hearst Publications, Inc.*, 322 U. S. 111, 131. This means that the administrative determination "is to be accepted if it has 'warrant in the record' and a reasonable basis in law" (*ibid.*), that "the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body" (*Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 146). See in addition to the cases cited, *Gray* v. *Powell*, 314 U. S. 402; *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251; *Shields* v. *Utah Idaho Central R. R.*, 305 U. S. 177; *Unemployment Compensation Commission* v. *Aragon*, 329 U. S. 143; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 399; *Cardillo* v. *Liberty Mutual Co.*, 330 U. S. 469; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297; *Virginian Ry.* v. *United States*, 272 U. S. 658; *United States* v. *Louisville & N. R. R.*, 235 U. S. 314; *Interstate Commerce Commission* v. *Union Pacific R. R.*, 222 U. S. 541.

The issues in those cases were of the same type as that involved here. Whether particular facts come within the concept of "gathering" raises the same sort of question as whether a carrier is an "interurban railway" (*Shields* v. *Utah, Idaho Central R. Co., supra*); whether a particular coal is "bituminous" (*Sunshine Anthracite Coal Co.* v. *Adkins, supra*); whether a particular person is a "producer" of coal (*Gray* v. *Powell, supra*); whether one company has "control" of another

(*Rochester Telephone Corp.* v. *United States, supra*); whether particular persons are "employees" (*National Labor Relations Board* v. *Hearst Publications, supra*); whether employees are "members of the crew" (*South Chicago Coal & Dock Co.* v. *Bassett, supra*); or are injured "in the course of employment" (*Cardillo* v. *Liberty Mutual Co., supra*); or whether there is a "labor dispute in active progress" (*Unemployment Compensation Commission* v. *Aragon, supra*). In each of the cases cited, the Court upheld the administrative application of the statutory phrase cited so long as it had a reasonable basis in law and was supported by evidence in the record.

In this case the question is whether there is reasonable basis for the Federal Power Commission's finding that the sales here in question are a part of "gathering." As shown in the statement, *supra*, pp. 9–17, witnesses with long experience in the natural gas industry and familiar generally with the operations taking place in the gas fields and plants and in particular with Phillips' activities testified with regard to the commonly accepted meaning of "gathering" in the industry. Most of the witnesses were in agreement that the activities of Phillips, including its sales at the termination of production and gathering to the transmission pipelines, were encompassed within the concept of gathering. Their testimony showed that the gathering business was regarded as a single enterprise running

from the wellhead to the final sale to the interstate transporter.

Moreover, as already discussed, the legislative history shows that the Act was conceived and drafted in terms of the economic functions performed by the separate divisions of the industry; that the economic function or business of gathering—the "gathering business" and "gathering rates" at the one end and local distribution at the other—were meant to be exempt from federal regulation; and that the business of transporting gas from the producing fields to the consumer markets and sales by companies engaged in such business, was the intended subject of Commission regulation (*supra,* pp. 29–65). The Commission's course of administrative construction has been consistent with this legislative background (*supra,* pp. 65–73).

Evaluating the evidence in light of this industry concept of gathering, the economic interrelationship among all of Phillips' natural gas activities, and the pertinent legal materials, the Commission found that the function of the lines moving the natural gas to each of Phillips' processing plants was that of gathering, and that such movement of gas and the lines themselves constituted a part of gathering and accordingly fell within the exemption (R. V 1743). The Commission also found that the processing of gas to make it saleable or to recover extractable products, or both, as well as the short lines from the

plants to the points of sale, were a "part of Phillips' gathering business" or "at least exempt as an incident of or activity related to its gathering process" (R. V 1743). The sales, the "end product of production and gathering, * * * [are] a part of Phillips' gathering business, or at least an exempt incident thereof" (R. V 1744).

These findings are shown to be reasonable by the evidentiary and other materials heretofore summarized. They show that in dealing with questions of this type the administrative agencies are not left merely with the function of "taking testimony to be submitted to the court for ultimate action" *United States* v. *Louisville and Nashville R. R.* 235 U. S. 314, 321. The decisions of this Court, cited *supra*, pp. 74–76, clearly holds that when it is found that the administrative determination has a basis in fact and does not lack a reasonable support in law, the judicial function is exhausted. The court below gave no weight to such a determination by the Commission that Phillips' sales were a part of "gathering" but treated the case as if it merely raised a question of law (R. V 1849–1850). In so doing the court misconceived the teaching of the cases cited above, which recognize that questions of this sort call for the expert judgment of the administrative agency. Since the Commission's determination was a reasonable one and warranted in the record, it should have been upheld.

D. THE COURT BELOW MISCONSTRUED THE PRIOR DECISIONS OF THIS COURT

The court below ruled that this Court's decisions were contrary to the C mmission's position that sales of natural gas such as those here involved were not subject to Commission regulation. The cases relied on were *Colorado Inter-State Gas Co.* v. *Federal Power Commission,* 324 U. S. 581, and *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U. S. 682 (R. V 1844–1847). At the same time, the court treated as irrelevant the later decisions of this Court in *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.,* 337 U. S. 498, and *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.,* 340 U. S. 179 (R. V 1849, fn. 13, 1847, fn. 9). None of these cases pass on the question here presented. On the contrary, they leave the point open. On the whole, however, they furnish considerable support for the Commission's decision here rather than that of the court below.

1. *The Colorado Interstate* case.—The *Colorado Interstate* case, on its face, clearly does not pass on the present issue. The affiliated companies involved in that case, in addition to producing and gathering, also owned an "interstate transmission system" (R. V 1845). The issue was whether the Commission in fixing the rates for sales made after transmission in interstate commerce, long after the completion of production and gathering, could include Canadian's produc-

tion and gathering facilities in the rate base (R. V 1845). The Court held only that in determining the rate base for gas sold by a pipeline company *after* transmission in interstate commerce, the Commission could (but was not required to) take into account the cost of the companies producing and gathering operations (324 U. S. at 601–602). In so holding, the Court cautioned (324 U. S. at 602–603):

> That does not mean that the part of Section 1 (b) which provides that the Act shall not apply "to the production or gathering of natural gas" is given no meaning. Certainly that provision precludes the Commission from any control over the activity of producing or gathering natural gas. For example, it makes plain that the Commission has no control over the drilling and spacing of wells and the like. It may put other limitations on the Commission. We *only* decide that it does not preclude the Commission from reflecting the production and gathering facilities of a natural gas company in the rate base and determining the expenses incident thereto for the purposes of determining the reasonableness of rates subject to its jurisdiction. [Italics supplied.]

Since, in *Colorado Interstate* there was no attempt to regulate sales to a pipeline company at the termination of gathering, the case has little significance here.

2. The *Interstate* case. While somewhat closer to the case at bar than *Colorado Interstate*, the *Interstate* case also did not require the court below to reach the result which it did. Most significant, we submit, is the fact that in its one direct reference to the line of Commission decisions which reflected the Commission's position in the present case (see pp. 65–73, *supra*), this Court stated that it was expressing no opinion, saying (331 U. S. at 690, note 18):

> The Federal Power Commission has not asserted jurisdiction over all sales taking place in the natural gas fields even though in interstate commerce for resale for ultimate public consumption. *In the Matter of Columbian Fuel Corp.*, 2 F. P. C. 200; *In the Matter of Billings Co.*, 2 F. P. C. 288. We express no opinion as to the validity of the jurisdictional tests employed by the Commission in these cases.

The *Interstate* case is also factually distinguishable. The Commission had found that Interstate purchased certain gas gathered by others in the Monroe Field, commingled that gas with gas which it had produced and gathered, and after the completion of gathering, then transported the commingled gas to the points of delivery for sale to others for resale. *Interstate Natural Gas Co.*, 3 F. P. C. 416, 420. Its position, as disclosed in its brief filed in this Court, was that, on the basis of its findings, Interstate was engaged in "trans-

porting" the gas *after the completion of gathering and prior to the sales* (see Brief for Respondent in No. 733, Oct. T. 1946, pp. 29–33).

This Court's decision may not have turned on this distinction (331 U. S. at 692). But the Court did emphasize another distinguishing factor, that (p. 691):

> There is nothing in the record to indicate that the regulation in question is in any way inconsistent with the exercise by Louisiana of the powers over production and gathering of natural gas reserved to it by Congress in § 1 (b) of the Act. * * * The record is devoid of any suggestion that Louisiana has ever opposed the jurisdiction of the Federal Power Commission in this case or has ever urged that federal regulation of the sales in question would interfere with the exercise by the State of its regulatory functions.

The Court then went on to state (p. 692) that it was not suggesting that the—

> jurisdiction of the Commission in any case is to be determined by the resistance or lack of resistance on the part of the State to federal regulation. But in evaluating the Company's contention that the State's powers have been invaded, we regard it a matter of some significance that although the State has freely exercised its regulatory powers over the production and gathering of natural gas, there is no evidence of any conflict, present or threatened, in the per-

forming of those functions by the State with the exercise of the jurisdiction of the Federal Power Commission in this case.

In the instant case there was not only direct opposition to the exercise of the Federal Commission's jurisdiction by the States immediately concerned, Oklahoma, Texas, and New Mexico, but also detailed evidence that regulation by the Federal Commission would substantially interfere with and conflict with the States' regulatory powers. Texas: R. II 375–520, 557–592; Oklahoma: R. II 602–619; New Mexico: R. II 521–557.

Moreover, the evidence showed that the maximum-price regulation provided by the Gas Act would interfere with the conservation functions of the states concerned.[43] The witnesses for these states testified as to the direct relationship of price to conservation.[44] Price increases have been

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[43] Oklahoma: Title 52 Okl. St. Ann. (1941), particularly Sections 81–87.1, 97–113, 201–203. Texas: Title 102, Vernon's Civil St. Tex. Ann. (1949), particularly Articles 6008, 6008a, 6008b, 6014, 6014a, 6015, 6016, 6029, 6036a, 6045–6046, 6049a, to e, 6050–6060. New Mexico: Ch. 69 New Mex. St. Ann. (1941), Sections 69–201 to 69–231.

[44] Murray (Chairman, Texas Railroad Commission), R. II 428–431, 437–440, 442–448, 449, 453–456, 458–459; Baumel (Chief Engineer, Texas Railroad Commission), R. II 513, 514–516, 517–519, 558–560, 566; Spurrier (Secretary of the Oil Conservation Commission of New Mexico), R. II 523–526, 528–530, 532, 547–549, 552–553; Capshaw (Engineer for Corporation Commission of Oklahoma), R. II 604–605, 605–606, 607; Jones (Member of Corporation Commission of Oklahoma), R. II 609–611.

prerequisite to successful State conservation regulation (R. II 547–549). A higher price for gas makes economically feasible the more expensive production methods necessary to avoid waste through premature abandonment, particularly as to initially low-producing marginal wells. (R. II 438–439, 442, 443–446, 516–517, 566, 604–605). That this is important is emphasized by the necessity for use of expensive equipment in "secondary recovery techniques", required not only to produce the gas remaining after pressure has so declined as to preclude further production without extractive machinery but also to effect more complete recovery by requiring use of such techniques initially (R. II 399, 439–440, 442, 516, 517, 604).

A similar relationship of price was shown to obtain with respect to State well-spacing programs (R. II 609–611). The size of the spacing unit is greatly affected by the price of gas (R. II 605–606). Thus, when price is depressed in Texas, its spacing rules become impossible to administer (R. II 515–516). Likewise, in fixing the size and shape of spacing units, Oklahoma considers the price of gas and the economics of drilling (R. II 609–611). In New Mexico, the unit is the area which may be efficiently and economically drained by one well.[46]

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[46] N. Mex. Stat., Ch. 69, § 69-2131/2(b) (Cum. Supp. (1951)).

The effect of the price paid producers and gatherers was shown to be even more direct in relation to State efforts to conserve gas produced in association with oil, that is, casinghead gas (R. II 445, 449–450, 451–452, 513, 518–519, 532–534, 548–549, 552–553). Many billions of cubic feet of such gas have been wasted in the past through the venting or flaring of oil wells (R. II 387–389, 444–445, 524–526, 559–560). Such wastage continues today in substantial quantities (R. II 454–455, 465, 473–474). The primary reason for this wastage is the insufficiency of the price to meet the costs of gathering and other operations necessary for the marketing of such gas (R. II 431, 438–439, 444–445, 451, 458, 474–475). Texas has ordered 17 oil fields shut in until casinghead gas could be gathered, marketed, or otherwise utilized (R. II 406–407, 518–519). State officials have viewed the validity of such orders as depending upon whether it was economically feasible to utilize the gas (R. II 429–430, 518–519).

Moreover, grave concern was expressed lest Commission jurisdiction over sales such as those of Phillips interfere with Texas' reinjection orders (R. II 461–462, 467–468). To maintain pressure and increase recovery of oil, Texas was then on the threshold of ordering reinjection not only of casinghead gas but also other gas in the Scurry field (R. II 396–399, 408–409). In the Shafter Lake-Devonian field, an order was issued

requiring return to the reservoir of all the gas and all the water produced (R. II 403–404). This directly affects Phillips' operations since gas from the field is processed at Phillips' Fullerton plant and sold to El Paso (R. II, 404–405, 408–409). But Texas indicated it would not be deterred even though the gas involved in such orders is committed to other sources (R. II 408–409), saying "We just have to take it away from the pipe lines right now but they are liable to need it more in the future" (R. II 403).

Commissioner Murray of Texas summarized this testimony in asserting that there is no jurisdiction the Commission might exercise over Phillips "without conflict resulting" (R. II 478–479). Of course, if the federal statute clearly authorized the exercise of power by the Federal Commission, such a conflict would not bar the federal jurisdiction. E. g., *Northern Natural Gas Co.* v. *Federal Power Commission*, 206 F. 2d 690 (C. A. 8), certiorari denied, 346 U. S. 922, pending on petitions for rehearing. But the *Interstate* opinion indicates that the possibility of such a conflict is a factor to be considered in determining whether Congress intended the federal jurisdiction to go that far. As the Court knows, Congress was seeking to fill a jurisdictional gap, not to supersede pre-existing state authority.

The evidence summarized above therefore does more than show that the *Interstate* case is distinguishable. It indicates that under the *Inter-*

state opinion the Commission was warranted in reaching the conclusion it did in the instant case.

As an additional basis for its decision, the court below held that the Commission had misinterpreted the statement in the *Interstate* opinion (p. 690), that the gathering exemption applied "where sales * * * are made during the course of production and gathering *and* are so closely connected with the local incidents of that process as to render rate regulation by the Federal Power Commission inconsistent or a substantial interference with the exercise by the State of its regulatory functions * * *." [Italics added.] The court emphasized that in its finding at R. V 1752–1753, the Commission had substituted "or" for "and," by concluding that Phillips' sales "constitute a part of its gathering business, *or* they are incidents of *or* activities related to such business" (R. V 1847–1848). But the court overlooked the dual basis of the Commission's conclusion. The finding quoted parallels, and was related to, this Court's discussion in the *Panhandle* case, not *Interstate,* and as to that the use of "or" was proper, see *infra,* pp. 88–90. On the other hand, in the portion of its treatment which applies the test set forth in the *Interstate* case, the Commission's finding, following the Court's language in the latter case, is in the conjunctive (R. V 1745). The Commission thus stated:

> these sales are made "during the course of production and gathering." *And* we ex-

pressly find that they are so closely connected with the local incidents of that process as to render rate regulation by this Commission inconsistent or a substantial interference with the exercise by the affected States of their regulatory functions. [Italics added.]

It is clear that the Commission made the express finding that the sales are in the course of gathering,[*] and not merely a finding in the alternative.

Further, this Court's language in the *Interstate* case, as well as in *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 506, discussed immediately below, suggests that the gathering exemption covers not merely the physical processes but "incidents connected with" (*ibid.*) gathering. It was not unreasonable, therefore, particularly in the light of the legislative history referred to above, for the Commission to regard the sale at the immediate end of gathering as such an incident, rather than as an aspect of the subsequent transportation.

3. *The Panhandle case.*—Although *Panhandle*, like *Colorado Interstate* and *Interstate*, does not pass upon the general question presented here, it reflects a concept of the "production or gathering" exemption broader than that adopted by the

[*] The court below so noted in a footnote and stated that it disagreed with this finding (R. V 1848, fn. 11).

court below and more akin to that of the Commission.

In *Panhandle*, the Commission claimed that the Act vested it with jurisdiction over the transfer of gas leases issued by a pipeline company in connection with its own production and gathering facilities. The Court rejected that contention and held instead that these gas leases were excluded from Commission jurisdiction by virtue of the production and gathering exemption. In so holding, the Court refused to construe the exemption as being limited only to the physical activities of production and gathering, stating "we cannot ascribe such a narrow meaning to the words, 'the production or gathering of natural gas'" (337 U. S. at 504). It examined the Act's legislative history (337 U. S. at 505, fn. 7; 509, fn. 15), which it stated (337 U. S. at 512–513):

> * * * is replete with evidence of the care taken by Congress to keep the power over the production and gathering of gas within the states. This probably occurred because the state legislatures, in the interests of conservation, had delegated broad and elaborate power to their regulatory bodies over all aspects of producing gas. The Natural Gas Act was designed to supplement state power and to produce a harmonious and comprehensive regulation of the industry. Neither state nor federal regulatory body was to encroach upon the jurisdiction of the other. Congress enacted this Act after full

consideration of the problems of production and distribution. It considered the state interests as well as the national interest. It had both producers and consumers in mind. Legislative adjustments were made to reconcile the conflicting views.

On the basis of this history, the Court concluded that the exemption included not only the activities of production and gathering, but in addition "incidents connected with" and "activit[ies] related to" such production and gathering (337 U. S. at 506, 515).

The Court thus held that "production or gathering of natural gas" embraced more than merely the physical activities of production and gathering. In addition, its reading of the legislative history, which parallels generally that of the Commission in this case, strongly suggests that the Commission, rather than the court below, adopted the proper approach in seeking to ascertain the scope of the exemption."

4. *The Cities Service case.*—While the *Cities Service* case similarly does not pass upon the

" A footnote at the end of the *Panhandle* opinion calls attention to the present problem and notes that it was then before Congress; the footnote quotes from a portion of a Report subscribed to by two Commissioners, as follows (337 U. S. at 516, fn. 25):

"No reasonable basis is found in the Act or its legislative history for a conclusion that, although the 'activities' of production and gathering are exempt under Section 1 (b), sales of natural gas which are made at arm's length by producers and gatherers who do not thereafter transport it in interstate commerce may be regulated."

general question presented here, it not only shows that this Court has not considered that it had previously passed upon the question (340 U. S. at 188–189), but indicates a view as to the importance of local regulation in the interest of conservation which might well have an important bearing upon the reading to be accorded the exemption for production and gathering.

In *Cities Service,* the issue presented insofar as here pertinent, related to the power of the State to fix minimum prices at the wellhead on natural gas produced within its borders and sold interstate. Basing its conclusion on decisions, many of which antedated the enactment of the Natural Gas Act (340 U. S. at 186–187), the Court held that the Commerce Clause did not preclude such regulation by the States, commenting (340 U. S. at 187–188):

> That a legitimate local interest is at stake in this case is clear. A state is justifiably concerned with preventing rapid and uneconomic dissipation of one of its chief natural resources. * * *
>
> We recognize that there is also a strong national interest in natural gas problems. But it is far from clear that on balance such interest is harmed by the state regulations under attack here. Presumably all consumers, domestic and industrial alike, want to obtain natural gas as cheaply as possible. On the other hand, groups connected with the production and transporta-

tion of competing fuels complain of the competition of cheap gas. Moreover, the wellhead price of gas is but a fraction of the price paid by domestic consumers at the burner-tip, so that the field price as herein set may have little or no effect on the domestic delivered price. Some industrial consumers, who get bargain rates on gas for "inferior" uses, may suffer. But strong arguments have been made that the national interest lies in preserving this limited resource for domestic and industrial uses for which natural gas has no completely satisfactory substitute. See generally, Federal Power Commission, Natural Gas Investigation (1948); *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U. S. 591, 657–660 (1944) (dissenting opinion). Insofar as conservation is concerned, the national interest and the interest of producing states may well tend to coincide. In any event, in a field of this complexity with such diverse interests involved, we cannot say that there is a clear national interest so harmed that the state price-fixing orders here employed fall within the ban of the Commerce Clause.

This reasoning is as applicable to sales at the end of gathering as to sales at the well. It recognizes the importance to the producing states that they be able to take appropriate steps, including the fixing of minimum prices, to prevent uneconomic dissipation of this wasting of a natural resource. And it also seems inconsistent with

the apparent premise of the decision below that all wholesale sales of natural gas in interstate commerce are beyond the power of the states to regulate and so within the gap intended to be filled by the Natural Gas Act.

It seems desirable to say a word with respect to the Court's recent decision in *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* Nos. 198–201, decided February 8, 1954. Although the tax there overturned as a burden on interstate commerce was described by Texas as a tax on the privilege of engaging in the "gathering of gas", the tax was really upon the interstate pipe line company which was not engaged in gathering. In addition, the case was concerned with a constitutional question and not with the interpretation of the Natural Gas Act, with respect to which the intention of Congress in enacting the particular legislation must control.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

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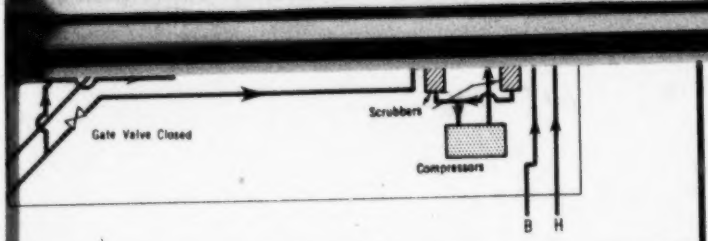

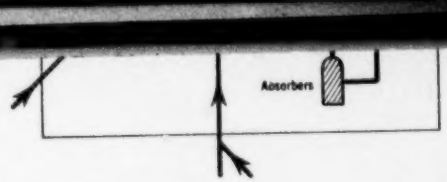

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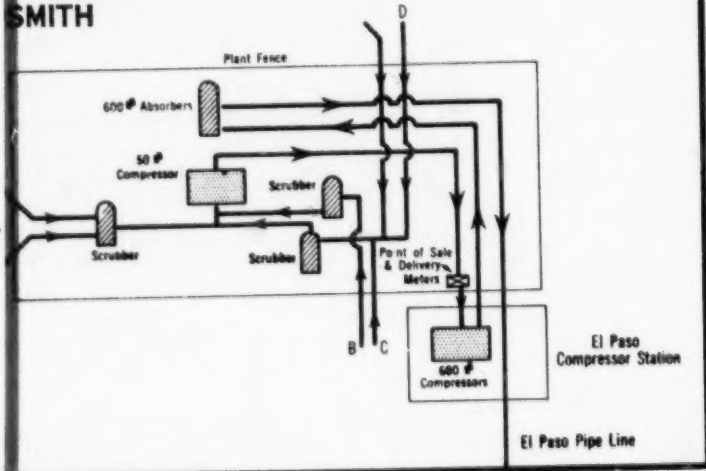

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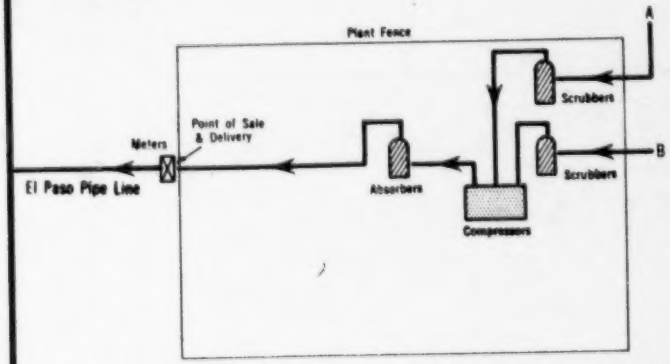

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